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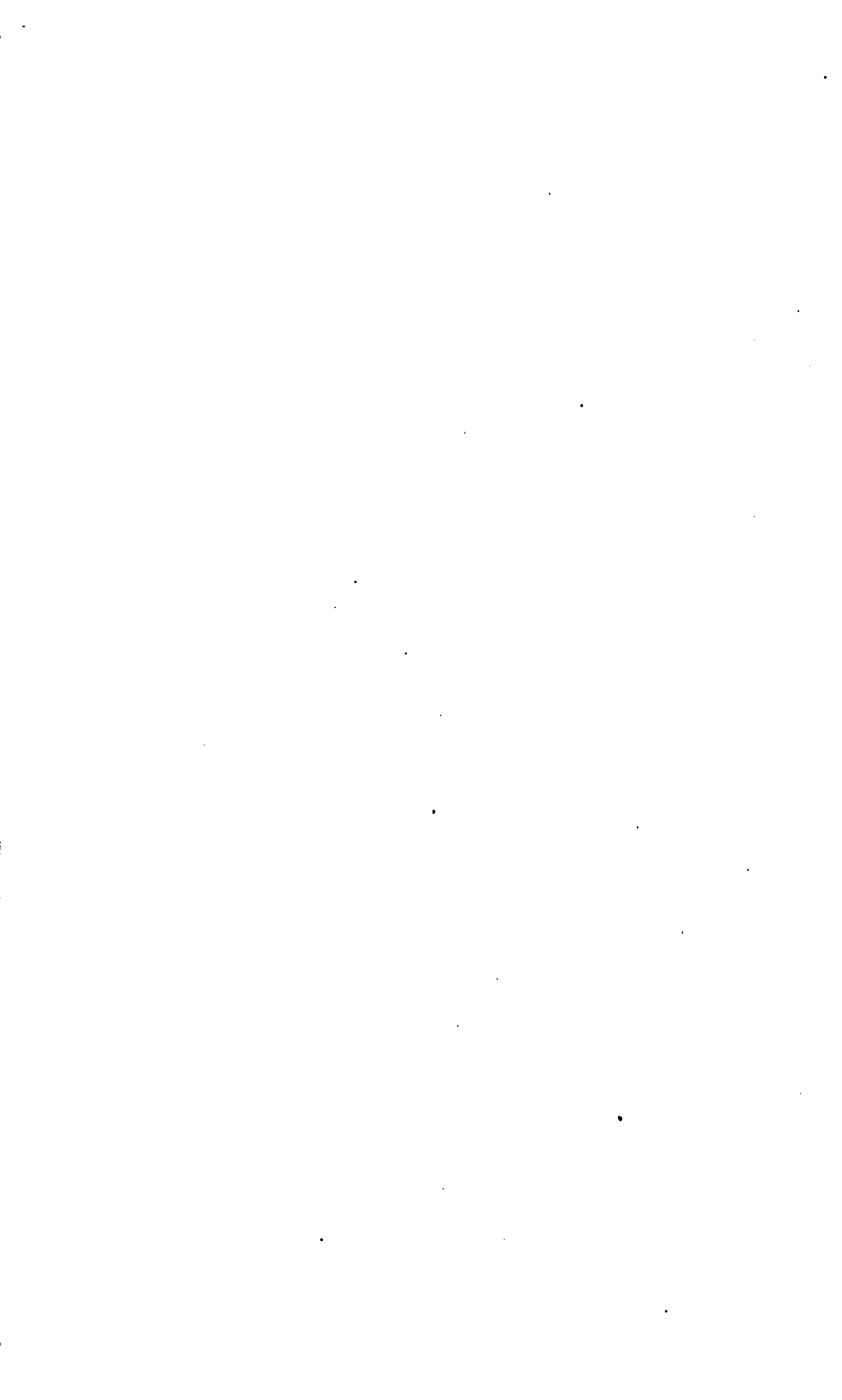
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TREATISE

ON THE

LAW OF SHIPPING

AND THE

LAW AND PRACTICE OF ADMIRALTY.

BY

THEOPHILUS PARSONS, LL.D.,

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, AT CAMBRIDGE.

IN TWO VOLUMES.

VOL. I.

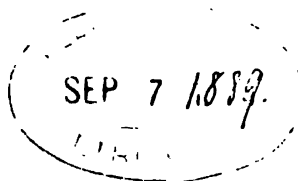
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## P R E F A C E .

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IN my work on Maritime Law, the first volume, and part of the second, related to the Law of Shipping, and the Law and Practice of Admiralty. I have now enlarged them to two volumes, and hope they will be found to include all the many recent important decisions on these subjects. I have not called this work a second edition of the former; as it is not only much enlarged, but upon its most important topics re-written; and it seemed to me more accurate to publish it as a new work. I repeat here the closing paragraphs of the Preface of the former work.

“Long ago I had become satisfied, that the boundless affluence of existing legal authority, and the rapid increase of the reports of English and American courts, and of other repositories of the law, made it with every passing year, more difficult for a lawyer to possess the means of a thorough investigation, and impossible for him to give the time and labor necessary for such investigation to the many questions which arise in practice. I was further convinced, that books might be made in which this labor of investigation should be so thoroughly performed, and the result so given in the text, and the authorization and illustration so put forth in the notes, as in most cases to render further research unnecessary, and to make it much easier when necessary. It is this book that I have endeavored to make. The difficulty of accomplishing such a work was obvious; but it did not seem impossible. I

knew that it could not be made without the command of a completed library, and that I have here; and an accumulation and consolidation of the results of a very large amount of intelligent labor, and for this purpose I have added to my own efforts the resources of skilful and zealous industry within my reach. But while I believe that none of the sources of our law have been left unexplored, I dare not hope that I have found everything of value. The materials thus gathered by me and for me, I have worked over, again and yet again, with unfailing patience at least, whether with success or not. For it has been my single purpose, by the most careful and vigilant elaboration of text and notes, to make as useful a book as I could; that is, one which should be, on the one hand, complete, and on the other trustworthy. I now give this book to the profession, lamenting its defects, and fearing that it has faults which I do not discern; but believing that I have a right to think that they are not caused by any want of earnest and unremitting endeavor on my own part, to make every page, and every part of every page, as good as I am able to make it.

“Of those who aided me most about my previous works, I have spoken in the prefaces to them. I have received valuable assistance in the present work from many persons. I must indulge myself with mentioning particularly, John Lathrop, Esq., of Boston, whose learning, and intelligence, and faithful industry, and capacity for exhaustive investigation, must soon give him a high place in his profession.

“In the Appendix will be found a complete collection of all the mercantile statutes and statutory provisions of the United States, together with the pilotage laws of New York and Boston (which may at least serve as a sample of all). If I may judge at all by my own wants in years past, such a collection may be of great use to the practical

lawyer. There will also be found such forms, whether of contract or of practice, as seemed to me most desirable."

I indulge myself with stating, that I have again had the valuable assistance of my friend, John Lathrop, Esq., of Boston, in preparing this edition ; and especially those chapters which relate to Collision, and the Law and Practice of Admiralty. Earnest efforts have been made to supply the want of a complete Treatise on these subjects, which have grown much in interest and in importance, within a few years.

THEOPHILUS PARSONS.

CAMBRIDGE, 1869.





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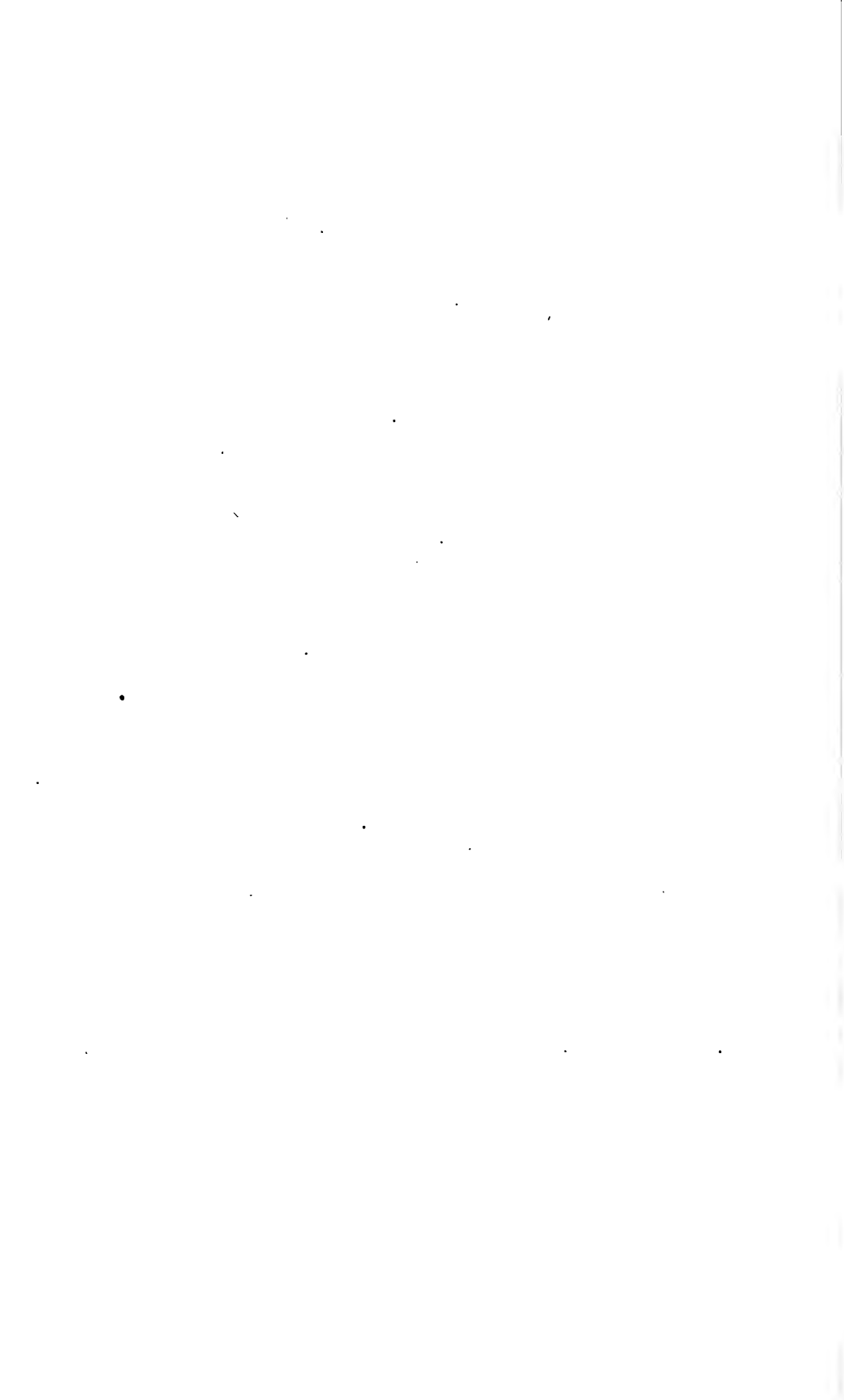
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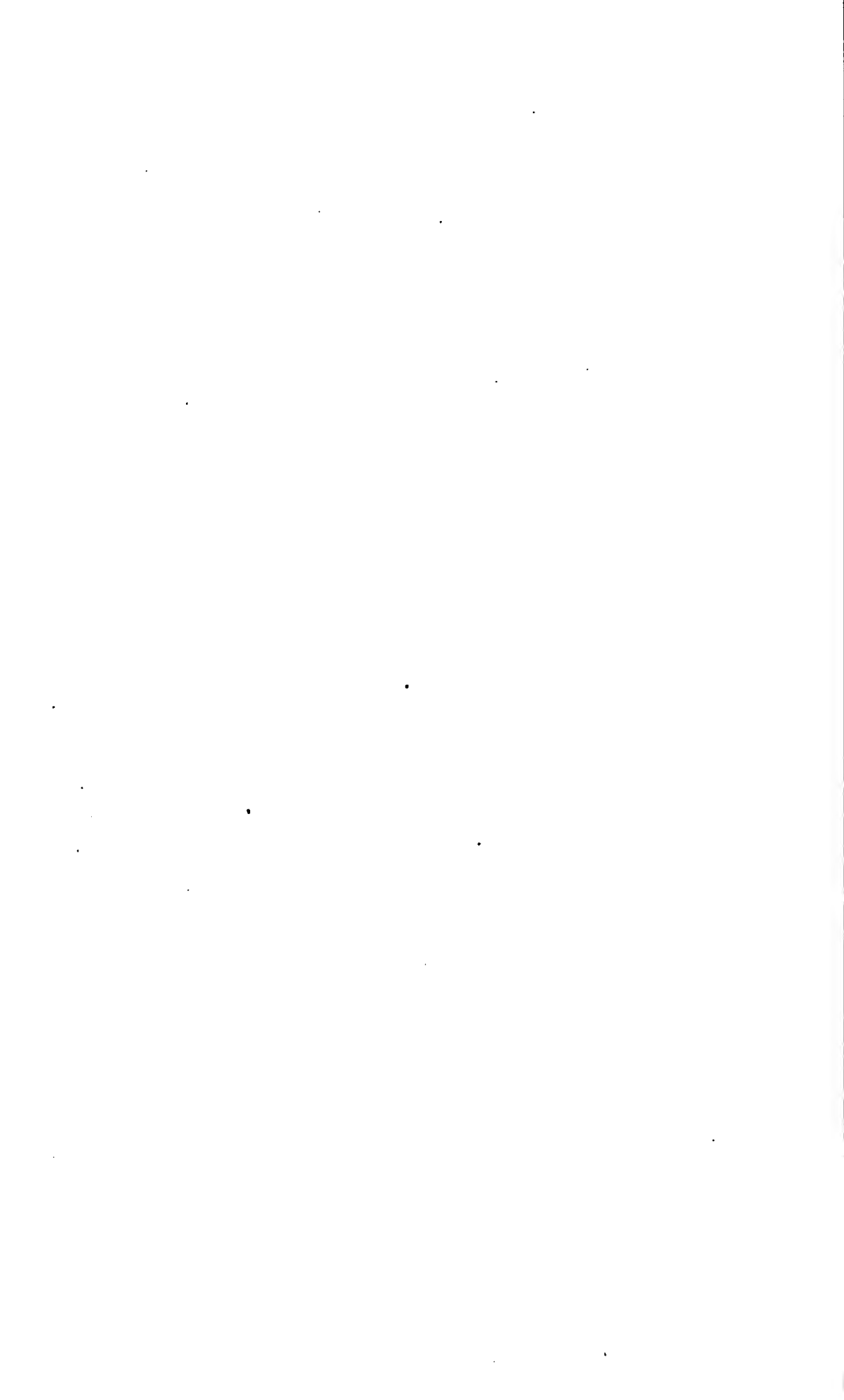
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**A TREATISE**  
**ON THE**  
**LAW OF SHIPPING**  
**AND THE**  
**LAW AND PRACTICE OF ADMIRALTY.**



# BOOK I.

ON THE LAW OF SHIPPING.

VOL. I. 1





# A TREATISE

ON THE

## LAW OF SHIPPING AND ADMIRALTY.

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### . CHAPTER I.

ON THE HISTORY AND ORIGIN OF THE LAW OF SHIPPING.

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#### SECTION I.

ON THE PRINCIPAL FOREIGN CODES AND WRITERS WHICH TREAT OF  
THIS LAW.

WHILE the common law of England was acquiring form and authority, the commerce of England was much less than that of some other of the states of Europe; and, in comparison with that of the same country in recent times, was slight and unimportant. Hence the principles of the common law are not adequate nor always applicable to the present exigencies of commerce.

There are occasional intimations, in even the oldest books of the law, that England had then shipping and merchants, and that questions in relation to ships came sometimes before the courts. Even in those ages, the usage of merchants was evidently—and sometimes expressly—referred to as a guide, if not a master, in cases of this kind. As, with the growing commerce of England, the questions grew more frequent, more diversified, and more important, this usage was referred to more and more constantly, and perhaps with increasing deference, until, out of this usage, or rather in conformity with it, but yet importantly modified by those rules of law with which the courts were most familiar, the law merchant of England gradually acquired force and authority.

Sometimes it is said to have grown up alongside of the common law. But, in fact, it was adopted step by step, as an integral part of the common law; and the flexibility of that system, and the vital force with which, as a living thing, it yielded to the new influences and supplied the new wants presented by successive changes in the condition of the people, are well illustrated by the way in which the law merchant became, to a very great extent, a part of the common law, and as such came over to this country, and is our law as it is that of England.

As this mercantile law was formed under the modifying, though not controlling, influence of the common law, so, on the other hand, it exerted a reciprocal influence upon the common law, through nearly all branches of the law of contracts. Thus the rules respecting sales, agency, parties, consideration, assent, and construction generally, all exhibit the clearest indications that the customs of merchants have produced important modifications of them. But the law of shipping, the law of marine insurance, and the law of negotiable paper, may be regarded as the principal topics which belong in an especial manner to the law merchant. They may be said to have had no other origin than the custom of merchants. The common law yielded somewhat slowly and reluctantly to their demands; and even when it adopted their customs, insisted upon the application of its own principles. In some instances these were retained and enforced, when they were incongruous, and incompatible with those customs; and sometimes the law merchant has suffered detriment from this cause, which has not, perhaps, wholly ceased to operate in England, or even in this country.

By the custom of merchants, which is thus regarded as the parent of the law merchant, is not meant merely the custom of English merchants at the time the English courts first took cognizance of these customs; and not merely the custom of English or American merchants at different periods from the beginning of the law merchant of England to the present day. For, if this were the case, we should have no other sources of authority for this custom, or for the rules derivable from it, especially in its earliest periods, than the brief and unfrequent cases in the early English reports in which questions of this kind are considered.

The common law has its old books of authority; and they are

numerous and excellent; Statham, Fitzherbert, Glanville, Brooke, Bracton, Fleta, Britton, Rolle, Sheppard, and — at the head, perhaps, of all — Coke, give not only to the antiquarian, but to the student, for present and practical purposes, needed and trustworthy information. To these we may add the reports of adjudged cases, which exhibit with the utmost clearness the history of the law for six centuries. But, in the treatises and digests above enumerated, we find little that can indicate more than the existence of a law merchant, or of the custom of merchants. And, although the earlier reports are not quite so barren in this respect, the notices they give of the law merchant are scanty, and of comparatively little value.

We are not, however, destitute of authority and precedent for the earlier, and, as they may well be called, the fundamental rules, of this great branch of the law. Indeed, this authority ascends to a far remoter antiquity; and the books, to which we must refer for it, have two other important advantages over their brethren of the common law. One of them is, that they give us the rules, not of one people or country, but of the commercial world, and therefore they are more free from local and partial causes of error or limitation. The other is, that, founded as they were upon the experience, the necessities, and the usages of the merchants generally of the then civilized world, they are characterized by a profound rationality and an exact justice, which are seldom, if ever, materially affected by the rights or prejudices of caste or class, or by that devotion to, and perpetual consideration of war with, one's neighbors, which was the soul of the feudal system, and through that system, necessarily influenced and injured the whole body of municipal law in all feudal nations.

These books retain at this day their utility, if not their authority. And no lawyer should consider himself *safe* in his knowledge of the law merchant, who has not studied them, at the very least, enough to enable him to make use of them when professional exigencies require him to do so. These books are, those of the Roman civil law, the *Consolato del Mare*, the *Laws of Oleron*, the *Laws of Wisbuy*, *Le Guidon*, the *Marine Ordonnance* of Louis XIV., with the *Commentaries* of Valin, and the principal treatises on this branch of the law by Pothier and other eminent writers of continental Europe.

It is true that neither the civil law nor either of these earlier codes treats of negotiable paper; <sup>1</sup> for that was a later invention. But it is also true, that the laws of continental Europe in relation to bills and notes are of much and growing importance and utility in the investigation of the questions presented under our own law in reference to those instruments; and these European systems are based upon the civil law, and qualified by it, at least as much as our own law is by the common law.

A similar remark may be made of insurance; excepting that, as the law of marine insurance is obviously dependent upon the law of shipping, as, for example, in questions of wreck, jettison, average, and contribution, and maritime contracts generally, we may learn much that is now useful, not to say indispensable, for the understanding and application of the existing rules of insurance law, from those earliest sources.

When we come to the law of shipping itself, we find at once that the present rules and principles, some even of those which might seem to be most peculiar, ascend to a higher antiquity than anything in the common law, or in any other existing system of law. Even the Roman civil law, in the rubric "*De lege Rhodia de jactu*," (Dig. 14, 2,) quotes and confirms the law of Rhodes concerning jettison. It would seem that this island possessed a flourishing commerce, at least a thousand years before the Christian era; that a system of law was there in force, which won a general acceptance in those ages, and was itself probably founded upon their established mercantile usages. Of this system we have preserved, certainly, only the fragment contained in the above-cited rubric; for the collection of maritime laws which may be found in the commentary of Vinnius, under the name of the Rhodian Laws, is undoubtedly a later compilation. But in this fragment we have the modern law of jettison, average, and contribution, as distinctly stated as in any recent text-book. It is in these words: "*Lege Rhodia cavetur, ut si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*" And the whole title of the Digest about this rule is wise and instructive.

There are, however, many other rubrics of the civil law which relate to shipping, and are not traceable to any earlier origin. The

<sup>1</sup> But see on this subject, Domat, Cushing's edition, sect. 1200.

rubric immediately preceding that just quoted, is, "De Exercitoria actione," of which the general purpose is to make the ship-owner responsible for the acts of the master of the ship.

The rubric, "Nautæ, caupones, stabularii, ut recepta restituant," (Dig. 4, 9,) provides that mariners (limited, however, in the title to the master of the ship), and the keepers of inns and stables, should be responsible for property committed to their charge. And this is confirmed in the rubric, "Furti adversus nautas, caupones, stabularios." Dig. 47, 5.

The rubric, "De nautico fœnore," (Dig. 22, 2, Code, 4, 33,) gives us the present rules which regulate loans on bottomry and respondentia.

In the rubric, "De incendio, ruina, naufragio, rate, nave expugnata," (Dig. 47, 9,) it is provided that fourfold damages should be paid by the plunderer of a vessel in distress.

In these rubrics there are provisions applicable especially to ships, and to those who own or navigate ships. And it should be added also, that, upon some other topics of deep interest in the law merchant, as payment, and imputation (or, as we term it, appropriation) of payment, carriage of goods, novation, loans and hiring of money, pledge, partnership, and finally the great topic of sales, the civil law is full of most profitable instruction.

It is perhaps to be regretted that the study of this system of law, which certainly deserves, if ever any system of law did, the proud title of "*ratio scripta*," is not more extensively pursued in this country. In England there was, formerly at least, a positive hostility to it; and it lingers there still, and may have come over to this country, and still exert some influence. If this were the proper place, it might not be difficult to show that it is at least questionable whether the common-law doctrine of sales, — which, upon the central question, when and how the property or ownership in the thing sold passes from the seller to the buyer, is in direct antagonism with the civil law, — is quite so well adapted to mercantile purposes; and whether, even now, a more extensive use of the civil law distinction between the *jus ad rem* and the *jus in re* would not assist in determining questions which must still be regarded as unsettled. If we do not mistake, there are some indications that the courts and the profession are beginning to find that the common law, which is ours by inheritance, may be use-

fully illustrated at least, and possibly qualified, by principles drawn from the Roman civil law.

Students are often deterred from any examination of the civil law, by a belief that useful knowledge of it cannot be acquired without the expenditure of a vast amount of time and labor. But this is a mistake. A thorough knowledge of all its principles cannot be acquired by less than a life of labor. Such knowledge, however, is not necessary; and the orderly arrangement of this law, the exactness and clearness of its phraseology, the complete and well-adapted apparatus for its study which now exists, and the excellent introductions to it which have been published in our language, enable a student, in his hours of collateral study alone, to learn much of its history and general character, and of the order in which its topics are presented, and of the manner in which the principal books of reference to this law are constructed. Having learnt this, he will find no difficulty in afterwards examining fully any question which may arise in his study or practice; and we are persuaded that no lawyer who shall pursue this course will afterwards find reason to believe that the hours thus employed were wasted. "It is most certain," says Dr. Strahan, in his preface to his translation of Domat, "that it is in the body of the civil law that we have the most complete, if not the only, collection of the rules of natural reason and equity, which are to govern the actions of mankind." This is high praise; but even if it be deserved, the advice of Chancellor D'Aguesseau to his son may not be the less necessary. He wishes him to "distinguish for himself that which belongs to natural and immutable justice from that which is only the work of a positive and arbitrary will; to avoid being dazzled by the subtleties which are frequently diffused in the Roman jurisconsults; and to draw with safety from their treasury of reason and common sense."

The *Consolato del Mare* is a code of maritime law of great antiquity and equal celebrity. But it is not open to the English student, as no translation into our language, excepting of a few chapters, has ever been published. The origin of this code is not certainly known; neither the names of its authors, nor the time nor the place of its earliest promulgation, can now be ascertained. It was first printed, probably, early in the fifteenth century, but is supposed to have been in force and in general use for a consider-

able time before. And, indeed, we consider the most reasonable theory of its origin to be that which regards it as a gradual collection or digest of all the principal rules and usages established among commercial nations from the twelfth to the fourteenth century. Very many topics of maritime law are treated of in it, and various commercial regulations have been added in the editions which have appeared, from time to time, in Europe. It may be referred to profitably in relation to the ownership of ships, and the rights and the obligations thereto ; to the rights and responsibilities of master and seamen ; to the law of freight, of equipment and supply, of jettison and average, of salvage, of ransom, and especially to the law of prize, in regard to which it has of late years exercised an important authority. The best edition by far, and by common consent, is that of Pardessus, in his *Collection of Maritime Laws*. We are in hopes that an English translation from this edition will soon be made and published in this country.

Next to the *Consolato* in time, or perhaps — for this is disputed — before it, come the *Laws of Oleron*. We know that these were collected, or at all events promulgated and published, as the rules then in force for the regulation of shipping, in the small island of Oleron, off the coast of France. The French claim that Queen Eleanor, who was Duchess of the province of Guienne, near which Oleron lies, authorized and caused their publication ; the English say that her son, Richard I., did this. The only thing certain is, that no one knows who their author was ; but they were undoubtedly first established somewhere in the twelfth century. This code has been repeatedly published in English, and is most accessible to American students in the Appendix to the first volume of *Peters's Admiralty Reports*. Their value to the student of the law of shipping may be inferred from an enumeration of the principal topics. These are the navigation and sale of a ship, the duties and the rights of master and mariners, wreck, freight, salvage, jettison, injuries to cargo, quarrels on board ships, collision, anchorage, supplies and repairs, the intentional stranding of a ship, pilots, partnership in vessels, and goods taken from wrecked ships.

The next code of which we shall speak is that known as “*The Laws of Wisbuy*.” The exact date of these also is uncertain ; and by some they are supposed to be older than the *Laws of Oleron*.



The weight of authority is, however, that they were founded upon the Laws of Oleron, and were only modified so far as to make them better adapted to the usages or the wants of the commercial states or cities of northern Europe; and that the code was published about the twelfth or thirteenth century, immediately after the Laws of Oleron. Wisbuy was a convenient port on the north-western coast of Gottland, an island in the Baltic, about equally distant from Sweden, Russia, and Germany. These laws, its former celebrity, and the works of art and luxury now found among its ruins, indicate that this city was the emporium of a great trade; although there is nothing in its position, and nothing preserved in its history, which explains either this or the rapid and total decay of its prosperity. Some historians, however, attribute its decline and destruction to dissensions and conflicts among its own citizens; and if they existed and endured, they would have been, indeed, a sufficient cause for swift and utter ruin.

This code covered a wide ground, embracing most of the topics of the law of shipping; but it is concise and sententious and very brief, occupying but a few pages in the Appendix to Peters's Admiralty Reports; and a cursory examination shows a coincidence with the Laws of Oleron quite too uniform to be casual.

The sixty-sixth section of the laws of Wisbuy has given rise to a curious question. It is in these words: "If the merchant obliges the master to insure the ship, the merchant shall be obliged to insure the master's life against the hazards of the sea." Here is a distinct recognition of the contract of insurance; and in terms which imply that it was familiarly known to mercantile persons. It follows, therefore, either that the Laws of Wisbuy are a much later work than is commonly supposed, — and against this theory the internal as well as the external evidence is very strong; — or that this section is an interpolation of later date, which is perhaps the prevailing opinion; — or that marine insurance and life insurance existed, and were common, centuries earlier than is commonly supposed. It is not the place here to go into a critical examination of this question; but we confess a strong disposition to adopt this last view, which seems to us supported by facts as well as arguments, and for which we have the high authority of Emerigon.

Some time in the sixteenth century, there was published a French work, commonly known by the name of "Le Guidon," of which

the whole title is "*Le guidon utile et nécessaire pour ceux qui font merchandise et qui mettent à la mer.*" This work was highly praised, as well as published and illustrated, by Cleirac, about a century after its first appearance, and is not unfrequently cited by writers on maritime law. But it relates mainly to bottomry and insurance, and, though there is some reference to other topics of the law of shipping, they are not presented with much fulness, and the work is of less value than those previously mentioned.

At length we reach the *Ordonnance de la Marine* of Louis XIV., published in 1681. Our own Kent calls this "a monument of the wisdom of his reign, far more durable and more glorious than all the military trophies won by the valor of his armies." It covers the whole ground of maritime law, including insurance; enacting with clearness and perspicuity all the provisions then in force, whether derived from the sources above enumerated, from a more general tradition, from previous enactments, or from usage. These it arranges in an excellent order; and displays a learning and ability in those who prepared it which forbids the supposition that they were mere compilers. But, strange to say, the authors of this ordinance are wholly unknown. This ordinance, also, is inserted in the Appendix to Peters's Admiralty Reports.

Almost a century after this ordinance appeared, Valin published his *Commentary* upon it. This admirable work acquired at once celebrity and authority, and is now oftener referred to in this country than any foreign work on maritime law. It was not, like Coke's *Commentary* on Littleton, a vast and ill-arranged mass of learning, that utterly submerged the treatise which it proposed to illustrate. But, while doing full justice to the ordinance, not only admitting its excellence in general, but exhibiting it clearly in detail, it is itself a work of the greatest utility, and of the highest authority.

We might now enumerate a long list of commentators and jurisconsults who have written, in some instances, for the purpose of illustrating the above-mentioned codes or laws, but more frequently, independent works of their own. The catalogue of names would, however, be of little use, unless we could present at least a general view of the particular merits of each one; and this would require far more space and far more labor than we could give to it. It may, however, be of some assistance to the student,

if we mention the names of a few of the most important, and describe their writings briefly.

We begin with Cleirac, a French author, who published, in 1647, at Bordeaux, a volume entitled "*Us et Coustumes de la Mer*" (Usages and Customs of the Sea). It is divided into three parts, which upon the title-page are called, — 1st. Of navigation. 2d. Of naval commerce and maritime contracts. 3d. Of the jurisdiction of the marine. In fact, however, the first part, containing 212 pages, consists of the Laws of Oleron, the Laws of Wisbuy, and the Ordinances of the Hanse towns, determined at Lubeck in 1597. The second part contains *Le Guidon*, in twenty chapters, of which we have already spoken. To this are added certain formularies or rules upon some of these subjects, which were in force in Antwerp and Amsterdam. The third consists of various ordinances of the governments of France, Spain, and the Netherlands, concerning the jurisdiction of the admiralty. All of these, however, and especially *Le Guidon* in the second part, are accompanied by very valuable notes and comments, making the whole book a complete and most trustworthy exhibition of the whole maritime law of that age.

In 1655, Roccus, a Neapolitan jurisconsult and lawyer, published a large work on maritime law, from which was taken and compiled a smaller work, published in Amsterdam in 1708, entitled "*De Navibus et Naulo, item de assecurationibus, notabilia*" (Of ships and freight, and of insurance). This is a learned, very able, and, at this day, very useful work. It does not purport, like Cleirac's volumé, to be a reprint or compilation of any previously existing works. But it gives the whole law merchant of that day, as it was known to a lawyer of full practice and high authority. The orderly arrangement of the topics, and the directness and simplicity with which they are treated, make a reference to this book, and the use of it, very easy. Each of the "*Notabilia*" contains a distinct statement of some rule or principle, followed by citations of authorities. Most of them are very brief, few covering so much as a page. An excellent summary at the beginning of the first part, of ships and freight, and another at the beginning of the second part, assurance, enables a student to turn readily to the precise thing he wishes to see. To these two parts are added select answers and arguments of Roccus in actual cases. We find

this work more frequently referred to than the former ; they are, however, very different, and neither supersedes the other.

Passing over a century, we come to another Italian legist, Casaregis ; who, after many years of full practice in mercantile cases, received the appointment of judge in the high courts of Tuscany, and held it for twenty years. His works were published after his death in four volumes, folio. The first two of these consist of two hundred and twenty-six "*Discursus Legales*," which cover the whole ground of commercial law, including insurance, the law of shipping, partnership, and exchange. The third volume contains an edition of the *Consolato del Mare*, with an ample commentary. The fourth volume is usually bound up with the third, both together being only about as large as either of the others. This last volume does not treat of commercial law, but of successions, and other analogous topics. Casaregis is a far more voluminous author than either of the preceding ; and his matter is not so well arranged ; certainly not so well for the mere convenience of the student. But his volumes contain a treasury of the law merchant. Scarcely any topic is omitted ; and many curious questions seem to have been anticipated, and are illustrated with the combined light of learning and genius. Story said of him, "I cannot say much about this book from my own knowledge, for I have only referred to it occasionally. But rarely have I looked into his works upon any contested question, without being instructed and enlightened by the perusal." And Valin has declared emphatically, that Casaregis is incontestably the best of all maritime authors.

We close this list with the name of Pothier ; in some respects the greatest name of all. Born in 1699 ; at the age of fifty, after he had acquired the highest reputation as a jurisconsult, he accepted the office of Professor of Law in the University of Orleans, to which he was appointed by D'Aguesseau. A year before, he had begun the publication of the *Pandects*. In the two centuries which have followed, there have been celebrated civilians, whose almost boundless knowledge may have surpassed Pothier's. But the common consent of those of the English and American judges and lawyers, who have sought the aid of the civil law in deciding questions of the present day, has given to Pothier the credit of being the most useful and the most trustworthy of civilians.

He was for some years employed in completing his edition of the Pandects. And then he poured forth in rapid succession a series of treatises upon a great variety of subjects, in which the student will find all that the most complete acquaintance with the civil law could give, but qualified, illustrated, and made thoroughly practical by an equal knowledge of the actual law of his time, and, yet more by the clearest view of the great and abiding principles of truth and justice and order, of which the rules of law must be the exponents, or be erroneous and perishable. Of these treatises, those which refer especially to commercial law, are, on obligations, in 1761; of the contracts of sale, in 1762; of bills of exchange, in 1763; of hiring, in 1764; with a supplement to this latter, in 1765, which treats of maritime hiring, and of partnership. Of the treatise on obligations, an English translation by Martin was published in 1802, and a better one by Evans, in 1806; this last has been republished in this country several times. The treatise on maritime hiring has been translated by Caleb Cushing, in 1821, and that on the contract of sale, by L. S. Cushing, in 1839. Both of these translations are excellent, and the books are in common use.

Sir William Jones, in a passage in which he claims the credit of introducing Pothier to the acquaintance of his countrymen, and regards this alone as discharging his debt to the profession, says: "I seize with pleasure an opportunity of recommending Pothier's admirable treatises on all the different species of express or implied contracts to the English lawyer; exhorting him to read them again and again."<sup>1</sup>

<sup>1</sup> See Jones on Bailments, p. 29. In the case of *Hoare v. Cazenove*, 16 East, 398, Lord Ellenborough, in a decision in which he cites several continental writers who are in conflict with each other, coincides with Pothier, and says that he is "a most learned and eminent writer upon every subject connected with the law of contracts, and intimately acquainted with the law merchant in particular." In the case of *Cox v. Troy*, 5 B. & Ald. 474, relating to the law of bills of exchange, *Abbott, C. J.*, and *Holroyd, J.*, speak of Pothier as of very high authority, and *Best, J.*, says, "The authority of Pothier is expressly in point. That is as high as can be had, next to the decision of a court of justice in this country." And closes additional remarks in his praise, by saying, "His writings have been constantly referred to by the courts." . . . "We cannot, therefore, have a better guide than Pothier on this subject." Byles, in the preface to his excellent work on bills and notes, says that Pothier "evinces a profound acquaintance with the principles of jurisprudence, and extraordinary acumen and sagacity in their

It is undoubtedly true, that the books above mentioned are almost unknown to the great body of the profession in this country, and to some of those who stand in its front ranks. But it is quite as certain that some of those who have attained the very highest position, and who have been most useful, and have done for the law of their country a good, a great, and a permanent work, have studied these books, and from these ancient and abounding sources have drawn the principles and arguments, the rules and the reason, which have enabled them to strengthen the foundations of the jurisprudence of their countries, or incorporate in the superstructure that which will never be taken away.

To speak only of the dead, and of two only of them. In 1756, Mansfield took his place upon the bench of England. Then, her commercial jurisprudence began to acquire form and regularity. He had the sagacity to see that the technical rules, and indeed the principles, of the common law, were not sufficient for the growing exigencies of British commerce. And he had the greatness to leave his own peculiar ground, and go where he could find the resources which he needed.

He brought to the commercial law of England three distinct elements. One of these was his own accurate and profound knowledge of the common law. Another was the usage of merchants, which he openly adopted as a guide, and endeavored to ascertain, as well by personal inquiries among them, as by special juries composed of them, and by examination of merchants as witnesses. But he added also yet a third, and it was a diligent study and a careful consideration of those old codes and writers that we have enumerated. In Scotland, the civil law is the basis of the municipal law, as the common law is in England. Murray, afterwards

application; the result of the laborious exercise of his talents on the Roman law." He adds, "There cannot be a greater proof of the surpassing merit of his works, than that, after the lapse of more than half a century, and a stupendous revolution in all the institutions of his country, many parts of his writings have been incorporated, word for word, in the New Code of France. The *Traité du Contrat de Change* is often cited in the English courts of law." For the estimation in which he is held in this country, I can only refer to the very frequent reference to him, not only in numerous cases, but by all our writers who look at all to civilians and writers of continental Europe. In some of Story's works, for example, we find note after note repeating Pothier's name, through many successive pages; and frequently with expressions of the highest commendation.

Lord Mansfield, was a Scotchman, and received a Scotch education, and thus became an excellent civilian. And the use he made of this knowledge was never obtruded, but never concealed. In one case,<sup>1</sup> where the important question of freight *pro rata* was for the first time fully considered in an English court, he cited, from the Pandects, the laws of Rhodes, — calling them “the ancientest laws in the world,” — the Consolato del Mare, the Laws of Oleron, from Cleirac’s *Us et Coustumes de la Mer*, the Laws of Wisbuy, and Roccus de *Navibus et Naulo*, and the Ordinance of the Marine of Louis XIV. Thus, in this one case, he refers to nearly all those works which we have enumerated. Marshall, in his book on insurance, exhibits Mansfield as almost the creator of the law of insurance for England, and supposes him to have drawn much of his knowledge on this subject from the ordinance of Louis, and the commentary of Valin.

I have already mentioned the name of our own Story. Placed in early life upon the bench of the supreme court of the nation, it was his fortune to be called upon to exercise the judicial functions in the infancy of our national jurisprudence. One great question met him at the beginning: What is the admiralty jurisdiction secured to the courts of the United States by the Constitution? Many, and probably a great majority, of the lawyers of this country, had no other idea of it than that which the shattered and fettered admiralty of England could give them. And, judging from all human probability, we have some right to say that, if Story had not then held that place of high authority, the admiralty jurisdiction of England at that time would have been ours at this moment.

None can deny that it was he, more than any other man, who settled this question; and he was obliged to maintain his ground against obloquy and reproach which might well have shaken any man. But the great and admitted utility of the free and wide admiralty jurisdiction, actually established among us, may induce an opinion that if Story had not taken that ground, and if, at his day, and at the beginning, this question had been decided otherwise, this same jurisdiction would have vindicated itself, and by some other instrumentality been restored to the fair proportions of which it was curtailed in England in a succession of ages, by the attacks

<sup>1</sup> *Luke v. Lyde*, 2 Burr. 882.

of rival and victorious courts. But it may be answered, that it was only by the greatest effort and the greatest firmness that the difficult work of restoring the admiralty system to its original extent and vigor was then accomplished. If it had been delayed, this work would have been with every added year more difficult, until it became impossible. And it is to be remembered that the profession would not then have had the opportunity of judging by experience of the utility and safety of this jurisdiction.

Story could not find all the true and original principles of admiralty, or of the law of shipping, in English law. He followed the lead of Mansfield, and went where they could be found; went to continental Europe; to the successive codes which in successive ages have defined that jurisdiction and built up that law, and to the many learned men who have illustrated both. But he went with a freer step than Mansfield, and a still wider research brought to him, on every point of the law merchant, still greater and more constant assistance. Story's fame does not need exaggeration nor concealment. If it be admitted that his vast and various official duties and personal undertakings, and the very extent of his inquiries, necessarily resulted in much knowledge that was only superficial, and some opinions that were erroneous, it will still always remain true, that to his sagacity, his firmness, his industry, his learning, and though last, not perhaps least, to the beautiful amenity and charming courtesy of his personal demeanor and the universal kindness which helped him so much in the many conflicts he was obliged to sustain, this country is very largely indebted for its admirable system of commercial law and commercial jurisprudence.

## SECTION II

### OF THE ENGLISH ADJUDICATION WHICH CREATED OR DEFINED THIS LAW.

It has been already intimated that the common law has welcomed and adopted the law merchant; at least, to a certain extent. It is instructive to observe the successive steps of this progress. Indeed, at the beginning, or in the early ages of the common law,



the "customs of merchants" appear to have had almost a greater respect paid to them, and a more positive authority allowed them, than in later times. And this, if it be a fact, may be explained in part by the want of that power and that rigidity in the common law which came with age, and its accumulation of precedents, and its observance of technicalities; and in part by the infrequency of questions of a commercial nature, and the apparent absence of danger; even if the few which came up were permitted to be decided by a law of their own. In *Magna Charta* itself (1215), the forty-seventh section<sup>1</sup> runs thus, "All merchants shall have safe and secure conduct to go out of and to come into England and to stay there, and to pass as well by land as by water, *to buy and sell by the ancient and allowed customs*, without any extortion, except in time of war, or when they shall be of any nation at war with us." And the next section defines the rights of alien merchants in war time.

In subsequent reigns, especially those of the Edwards, various statutes were passed, expressly "*de mercatoribus*," securing to them valuable privileges. At a later period, a question arose whether the "custom of merchants" was to be pleaded as a custom of certain places, or to be regarded as a part of the general law, of which the courts would of themselves take cognizance. In 1609,<sup>2</sup> the court say, "the judges ought to take notice of that which is used amongst merchants for the maintenance of traffic." And in 1622,<sup>3</sup> Chief Justice *Hobart* declared that "the custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice;" and he added, "and if any doubt arise to them about their custom, they may send for the merchants to know their custom." And Coke<sup>4</sup> says that "the *lex mercatoria* is part of the laws of this realm;" and in commenting upon *Magna Charta*,<sup>5</sup> he uses similar language.

There also arose another question; it was, whether the custom of merchants applied to mercantile contracts between any parties, or only to contracts between merchants. At first, the latter view seemed to be held, as in a case<sup>6</sup> which arose in 1613, where a

<sup>1</sup> Forty-seventh in Professor Bowen's excellent edition, but usually cited as the thirtieth.

<sup>2</sup> *Peirson v. Pounteys*, Yelv. 135.

<sup>3</sup> *Vanheath v. Turner*, Winch. 24.

<sup>4</sup> 1 Inst. 182 a.

<sup>5</sup> 2 Inst. 58.

<sup>6</sup> *Oaste v. Taylor*, Cro. Jac. 306.

drawee of a bill was sued on his acceptance, and it was held that the declaration was insufficient, because it was not alleged therein that the defendant was a merchant at the time of the acceptance.

A similar doctrine was maintained in 1632;<sup>1</sup> but in 1634,<sup>2</sup> where the defendant was called a merchant, it was held that the court would intend that he was a merchant at the time. And in 1666,<sup>3</sup> it was distinctly held, that the custom of merchants was a part of the law of the land, that it attached to the contract, which was a bill of exchange, and that "the custom is good enough generally for any man without naming him merchant."

Two years afterwards,<sup>4</sup> in a case which seems to have been very carefully considered, being declared by the court to be "of weight and concern for the future," it was held that a reference to the custom of the realm in the declaration was unnecessary, the Chief Baron adding, "it were worth while to inquire what the course has been amongst merchants, . . . for although we must take notice in general of the law of merchants, yet all their customs we cannot know but by information." It would seem from these words that the court would ask merchants to tell them the law; and this again might appear so inconsistent with the duty and the position of the court, that it would be supposed that merchants testified only as to the facts, for the jury. But in 1649,<sup>5</sup> where the covenant on a charter-party containing the exception "perils of the sea," the defendant pleaded capture by pirates, and the plaintiff demurred bringing up the special question of law, whether this was a peril of the sea. "The court desired to have Granly, the master of the Trinity House, and other sufficient merchants, brought into the court, to satisfy the court *viva voce*." And on this evidence and sundry certificates, the court decided the law against the demurrer, and in favor of the defendants.

It is very remarkable how long it continued to be made a question in the courts, whether the *lex mercatoria*, or custom of merchants, was a part of the law of the land, or only a special cus-

<sup>1</sup> Eaglechilde's case, Hetley, 167.

<sup>2</sup> Barnaby v. Rigalt, Cro. Car. 301.

<sup>3</sup> Woodward v. Rowe, 2 Keble, 105, 132.

<sup>4</sup> Anonymous, Hardres, 485.

<sup>5</sup> Pickering v. Barkley, Style, 132.

tom or usage, which affected only those persons, or those agreements, that were alleged and could be proved to be within it. For many years, and indeed ages, the profession seems to have resisted the doctrine that it was a part of the general law of the realm; but this was held by the courts uniformly and emphatically.

In 1689, twenty-two years after the case in *Hardres*, there was a demurrer in a case<sup>1</sup> which raised precisely this question, and again it was held that "all this law of merchants is part of the law of the land, and the judges are obliged to take notice of it, as well as of any other law." *Ventris*, one of the justices, said: "You here depend on the law of merchants, which at present, I think, we ought to take notice of." The uncertainty implied in the words "at present," is nearer to a doubt on this subject on the part of the court than we find in any other case. Again, this question was raised two years later in 1691,<sup>2</sup> and *Holt*, said, "the time is well enough by the law of merchants, and that is the same with our law." And *Eyres* said: "The law of merchants is *jus gentium*, and we are to take notice of it." And again in 1694, three years later,<sup>3</sup> the same question being raised, the rule in *Carter v. Downish* was emphatically confirmed, as it was also by Lord *Holt*<sup>4</sup> (in the same year); and, four years afterwards, the same question was raised and the same decision given.<sup>5</sup>

In 1760,<sup>6</sup> the court spoke in very positive language, as if they would prevent this question from ever being mooted again; *Foster*, J., saying: "The custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law. People do not sufficiently distinguish between customs of different sorts. The true distinction is between general customs, which are part of the common law, and local customs, which are not so. This custom of merchants is the general law of the kingdom, part of the common law, and therefore ought not to have been left to the jury after it has been already settled by judicial determinations."

<sup>1</sup> *Carter v. Downish*, 1 Show. 127.

<sup>2</sup> *Mogadara v. Holt*, 1 Show. 317, 12 Mod. 15.

<sup>3</sup> *Williams v. Williams*, Carth. 269.

<sup>4</sup> *Hodges v. Steward*, 12 Mod. 36.

<sup>5</sup> *Pinkney v. Hall*, 1 Ld. Raym. 175. See also *Bromwich v. Lloyd*, 2 Lutw. 1585; *Hawkins v. Cardy*, 1 Ld. Raym. 360.

<sup>6</sup> *Edie v. East India Co.* 2 Burr. 1226.

And Justice *Wilmot*, says: "The custom of merchants is part of the law of England; and courts of law must take notice of it as such. There may, indeed, be some questions depending upon customs among merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinions of merchants thereupon." And, after referring to two cases, in which the precise question of this case as to the manner of indorsement was decided, he adds, these two cases "serve to prove that there is no such custom of merchants as the defendants pretend; for they could not have been so determined as they were, if there had been such a custom of merchants. Therefore these judicial determinations of the point are the *lex mercatoria* as to this question, for they settle what is the custom of merchants; which custom is the *lex mercatoria*, which is part of the law of the land." And finally, in 1765,<sup>1</sup> Lord *Mansfield* said: "The law of merchants and the law of the land is the same. A witness cannot be admitted to prove the law of merchants. We must consider it as a point of law."

There may seem to be an inconsistency on this point. In some of the cases it is said that merchants may be examined; while Lord Mansfield says that no witness can be admitted. But if the cases are examined, it will be found that the conflict is apparent only. The rule to be gathered from them is quite clear, and may be stated thus. If there is any question or uncertainty as to what the custom of merchants is, evidence on this point may be addressed to the court for the purpose of removing doubts from their minds; but then it is their duty, when they have ascertained what the general custom of merchants is, to consider that as the law of merchants, and therefore as a part of the law of the land, and to recognize it, and apply it accordingly.

It may certainly be regarded as a well-established rule of American law, that this law merchant is an integral part of our own law, equal in its force and authority to any other. But there is still another principle in regard to the law merchant, which needs a more profound recognition, a fuller development, and a more constant recollection. It is, that the law merchant is not so much a branch of our municipal law as of public law. It belongs to both; and stands in such a relation to both, that the municipal

<sup>1</sup> *Pillans v. Van Mierop*, 3 Burr. 1669.

law must constantly look to the law of nations for instruction and guidance in relation to it; or, in other words, the common law of any country adopts it from the common law of the world, and must not forget its origin.

In Molloy's work, *De Jure Maritimo et Navali*, he says, B. 3, c. 7, s. 15: "Merchandise is so universal and extensive, that it is in a manner impossible that the municipal laws of any one realm should be sufficient for the ordering of affairs and traffic relating to merchants. The law concerning merchants is called the law merchant from its universal concern, whereof all nations do take special knowledge." And the same idea is expressed in some of the cases from which we have already quoted, where it is said that the *lex mercatoria* is a part of the *jus gentium*. This doctrine is of great practical importance. If it had been more freely admitted in English jurisprudence, their law of shipping, especially in relation to liens, would have escaped some embarrassment and some uncertainty, much of which we are free from.

This principle recommends itself so strongly, and equally on the grounds of justice and expediency, that its early and general recognition is not surprising. There is a remarkable passage in the Pandects, which we think bears strongly upon it. In the title *De Lege Rhodia de Jactu*, to which we have already referred, Dig. L. 14, tit. 2, § 9, occurs what we should call a case stated to the Emperor Antonine, calling for a decision. The answer is, "I, indeed, am lord of the world; but the law is (the lord) of the sea. Whatever the Rhodian law prescribes in the premises, let that be adjudged." Here is precisely the distinction we would suggest. The imperial despotism of Rome, while asserting its absolute and universal sovereignty, acknowledges that the ancient code of the little island of Rhodes, because it had been sanctioned and established by long usages among all whose business is on the sea, must govern there. So, too, we find the later codes, of Oleron, and Wisbuy, and the Consolato, for example, made not for one state or nation, but for all; and imposed upon them, not by the authority of a sovereign right, but by the sanction of a sovereign custom.

So should it be. We may well hope, for not theory only but history begins to promise this, that the great function of commerce is to bring the nations of the world together. Of the splendor and

wealth derivable from commerce, there were examples in the earliest ages, even before Tyre ; but they were very limited in their influence and in their duration. In that olden time, the same word sometimes meant a stranger and an enemy. In Greece, the merchant was a pirate when occasion offered. He was better than this in Rome, but commerce held no high position there. In the Middle Ages, it began to assert its worth and dignity, and the greatest perhaps of the Medici was too proud of his success as a merchant, to permit that any other title should be added to his name. Still more lately, commerce has grown stronger, and with its strength its good influence has grown also. And, not to pause upon illustrations which might be drawn in great numbers from intermediate history, we may well believe that the great commerce, which now bridges the Atlantic, operates powerfully, and we may hope that it will operate successfully, to preserve the peace, — this peace so fertile of all good, — between the old world and the new. If, in the beginning of mankind, it was much that the family gathered its members into one fold ; and if it was a later step which gathered families into states, this may not be the last step. The reasonable, as well as the hopeful, must be permitted to regard it as within the wide circle of possibility, that all states and nations may be gathered into one brotherhood of man. And if this — dream, perhaps it may be called — should ever become fact, assuredly commerce will be one of the most potent of the instruments by which so great a good shall be wrought.

The commerce of the world has reached at this moment an enormous development. It may well seem to us that it can go no further ; that it stands on its culminating point. But it is more probable that the future will regard only as the beginning, that which may seem to us a consummation. Assuredly the growth and extension of commerce, its conformity with the essential principles of justice and of reason, and with the needs and the progress of mankind, and, indeed, all its prosperity and all its utility, from the highest to the lowest ground, will be advanced by constantly regarding the laws of commerce as intended to be universal ; and, therefore, by respecting what in them is universal, in preference to that which is local and limited, and by giving to all questions that answer which shall make the principle or precedent resulting from it conform most perfectly with those which the nations have already settled by a general usage.

That the common law has already done this to a very great degree, and that it has not done this perfectly, has been already intimated. And it may not be out of place to close this sketch of the history of the laws of commerce, with the hope, that it may be one of the effects of the established freedom of this country that we may set such an example of wide and far-reaching sagacity in our shaping of the laws of commerce, that the nations of the world may join with us effectually in making the law merchant the law of the whole world.

## CHAPTER II.

## OF THE REGISTRY AND NAVIGATION LAWS.

## SECTION I.

## OF THE HISTORY OF THE REGISTRY ACTS.

WE have seen in the preceding chapter, that the common law of England, from which that of America is derived, was formed while the great mass of valuable property consisted of land, and things fixed to the land. Negotiable choses in action, and all those interests, which are represented and transferred by means of certificates and scrip, were either unknown or little used; and movables, or personal property in possession, constituted but a small portion of the wealth of the country. Hence the law of personal property is of comparatively recent origin; and only of late has it assumed that systematic and scientific form which now belongs to it.

Between these two, — the law of real property, and the law of personal property, — and differing in some particulars from both, is the law of shipping. That a ship is personal property, and not real property, is certain;<sup>1</sup> but it is a very peculiar kind of property, both in fact and in contemplation of law; and this was true in very ancient systems of law,<sup>2</sup> although neither commerce nor its great instrument, the merchant ship, had then reached anything like the importance and magnitude they have now attained.

We have said the ship is the great instrument of commerce; and as England, from its insular and otherwise favorable position, found its commerce becoming one of the most important sources of its power and prosperity, the laws we have mentioned in the previous chapter were enacted some centuries ago, providing, with great precision, for the nationality of the ship, and the trustworthiness and preservation of the evidence of that nationality. These

<sup>1</sup> Boccus, note xxxviii.; Jacobsen's Sea Laws, 21.

<sup>2</sup> See Jacobsen's Sea Laws, *ut supra*.



laws are usually called The Registry and Navigation Laws. It is said that they originated in their present form some two hundred and fifty years ago, in the desire of Spain to preserve for herself the valuable commerce of her colonies in America.<sup>1</sup> In England, they may be regarded as beginning substantially with the 12 Car. 2, c. 18.<sup>2</sup>

The principal purpose of this and subsequent statutes was to prevent other nations from having the carrying trade between England and her colonies, and between other countries and England; and it was therefore provided, that only British ships should carry merchandise between England and her colonies, and that no merchandise should be brought from foreign countries to the British dominions, except by British vessels, or the vessels of the countries of which the goods imported were the growth.<sup>3</sup> No vessel was to be deemed British, unless wholly built somewhere in the British dominions, excepting only those condemned and sold as prize;<sup>4</sup> and if a British ship became by any sale the property of an alien, it could not afterwards become a British ship again, by resale to a British subject.<sup>5</sup>

In order to secure to British ships these advantages, and to the British nation this monopoly, an exact and almost severe system of registration was adopted, and has remained in force, with but little change, for nearly two centuries. In 1850, however, by the 12 & 13 Victoria, c. 29, the principle of "free trade" was, par-

<sup>1</sup> Reeves's History of the Law of Shipping, p. 35. See also 2 Browne's Civil and Admiralty Law, p. 125.

<sup>2</sup> The first statute passed for the benefit of navigation was the 42 Ed. 3, which enacted that all ships of England and Gascoigne which came into Gascoigne should be first freighted to bring wines into England before all other. This being, however, of but little importance, the statute of 5 Rich. 2, St. 1, c. 3, which provided that none of the king's subjects should thenceforth ship any merchandise in going out or coming within the realm of England, except in English ships, under penalty of forfeiting the merchandise or the value of it, has been considered as the primary one. Stat. of 6 Rich. 2, c. 8, enacted that this law should only apply, "as long as ships of the said liegeance were to be found able and sufficient in the parts where the merchants happened to dwell." For various subsequent statutes on this subject, prior to Stat. 12 Car. 2, c. 18, see the valuable treatise of Mr. Reeves on the History of the Law of Shipping.

<sup>3</sup> 12 Car. 2, c. 18, § 1.

<sup>4</sup> 13 & 14 Car. 2, c. 11, § 7.

<sup>5</sup> 3 & 4 Will. 4, c. 55, § 9.

tially at least, introduced into the navigation laws; for it was provided, that ships, other than those of British build, may become British ships by register, if wholly owned by British subjects; and all ships may bring to England all merchandise, excepting that the queen (or king) of England, in council, may interpose against the commerce, or against the ships, of any country, such duties, charges, restrictions, or prohibitions, as will put the ships of those countries in British ports on the same footing on which British ships stand in the ports of that country. Later statutes have confirmed, and in some respects extended, the operation of this principle.

The principal acts of registry and navigation in this country are those of December 31, 1792, entitled "An act concerning the registering and recording of ships and vessels;"<sup>1</sup> of February 18, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same;"<sup>2</sup> and of March 1, 1817, entitled "An act concerning the navigation of the United States."<sup>3</sup> By this last act, it is provided that no merchandise shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in vessels wholly belonging to citizens of the country, of which the merchandise is the growth or manufacture; or from which such goods, wares, or merchandise can only be, or most usually are, first shipped for transportation; under penalty of forfeiture of ship and cargo. And no merchandise whatever shall be imported from port to port of the United States in any foreign ship (other than that imported in such vessel from some foreign port, and which shall not have been unladen), under penalty of forfeiture of the merchandise. But it is provided, also, that this regulation shall not extend to the vessel of any foreign nation which has not a similar regulation in force. In an Appendix to this work, we shall give the principal statutes now in force; and it will be seen that we have not as yet relaxed our navigation laws, so far at least as to permit foreign built ships to become our own, or foreign ships to share in the advantages derived by our own from their nationality, in any degree.

<sup>1</sup> Ch. 1, 1 U. S. Stats. at Large, 287.

<sup>2</sup> Ch. 8, 1 U. S. Stats. at Large, 305.

<sup>3</sup> Ch. 31, 3 U. S. Stats. at Large, 351.

## SECTION II.

## WHAT SHIPS MAY BE REGISTERED, AND WHAT ENROLLED.

The first registry act of 1789<sup>1</sup> provided that any ship or vessel built within the United States, and belonging wholly to a citizen or citizens thereof, or not built within the United States, but on the 16th May, 1789, belonging, and thereafter continuing to belong, to a citizen or citizens thereof, and of which the master is a citizen thereof, may be registered as directed in the statute. And, being so registered, shall be deemed a vessel of the United States. The twenty-second section of this act provides that vessels which come under the preceeding description, and are of twenty tons burden or more, if destined for the coasting trade or fisheries, and not registered, must be enrolled, in order to enjoy the privileges of a ship of the United States.

This act, after a slight amendment by a suppletory act passed at the same session,<sup>2</sup> was repealed by the 30th section of the act of December, 1792,<sup>3</sup> which statute is now in force.

The following vessels are entitled to the privileges of American vessels, so long as they continue to be wholly owned by a citizen or citizens of the United States.<sup>4</sup>

1st. Those registered by virtue of the act of 1789, ch. 11.

2d. Those which, after the last day of March, 1793, are registered, pursuant to the act of 1792, ch. 1.

3d. Those duly licensed for carrying on the coasting trade and fisheries.

*What ships may be registered.*

The following ships are entitled to be registered, by act of 1792.<sup>5</sup>

1st. Those built within the United States, whether before or after the 4th of July, 1776, and belonging wholly to a citizen or citizens thereof.

<sup>1</sup> Ch. 11, 1 U. S. Stats. at Large, 55.

<sup>2</sup> Ch. 22, 1 U. S. Stats. at Large, 94.

<sup>3</sup> Ch. 1, 1 U. S. Stats. at Large, 287, 299.

<sup>4</sup> Act of 1792, ch. 1, § 1, 1 U. S. Stats. at Large, 287.

<sup>5</sup> Act of 1792, § 2.

2d. Those not built within the United States, but on 16th May, 1789, belonging and thenceforth continuing to belong to a citizen or citizens thereof.

3d. Ships or vessels after 31st December, 1792, captured in war by a citizen or citizens of the United States, and lawfully condemned as prize.

4th. Those which have been or may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by a citizen or citizens thereof.

There is an express proviso that no such ship or vessel shall be entitled to be so registered, or if registered shall be entitled to the benefits of registry, if owned in whole or in part by any citizen of the United States who usually resides in a foreign country, during the continuance of such residence; unless he be a consul of the United States, or an agent for and a partner in some house of trade or copartnership consisting of citizens of these States actually carrying on trade within the States. By act of 1797, ch. 5,<sup>1</sup> no vessel which has been or which shall be registered pursuant to any law of the United States, and which shall be seized or captured, and condemned, under the authority of any foreign power, or that shall by sale become the property of a foreigner or foreigners, shall be entitled to receive a new register, notwithstanding she shall afterwards become American property; but such vessels shall be taken and considered, to all intents and purposes, as foreign vessels. This statute, however, makes an exception in favor of the owner of the vessel at the time of the seizure or capture of the same, and provides that nothing in the act shall extend to, or be construed to affect, such owner, or to prevent him in case he regain a property in such ship or vessel so condemned, by purchase or otherwise, from claiming and receiving a new register. This proviso has been extended to the executors or administrators of such owner.<sup>2</sup>

By act of 1852, ch. 4,<sup>3</sup> the Secretary of the Treasury is authorized to issue a register or enrolment for any vessel built in a foreign country, and wrecked in the United States, and then purchased and repaired by a citizen of the same, provided that it be

<sup>1</sup> 1 U. S. Stats. at Large, 523.

<sup>2</sup> Act of 1804, ch. 52, § 2, 2 U. S. Stats. at Large, 297.

<sup>3</sup> 10 U. S. Stats. at Large, 149.

proved to the satisfaction of the Secretary of the Treasury that the repairs put upon the vessel shall be equal to three fourths of the cost of the vessel when so repaired. And by the act of March 27, 1804, § 1,<sup>1</sup> it is provided that no vessel is entitled to registry, or to the benefits of registry, if owned in whole or in part by a non-resident naturalized citizen, who resides more than one year in the country from which he originated, or more than two years in any foreign country, unless he be a consul, or other public agent of the United States. This act contains also the proviso that nothing contained in it shall be construed to prevent the registering anew of any ship or vessel before registered, in case of a *bond fide* sale thereof to any citizen or citizens resident in the United States, and that satisfactory proof of the citizenship of the person on whose account a vessel may be purchased, shall be first exhibited to the collector, before a new register shall be granted for such vessel.

If any registered ship shall be sold or transferred, in whole or in part, in trust, confidence, or otherwise to a subject or citizen of any foreign state or prince, and the transfer is not made known to the collector and her register delivered up within seven days after the transfer, if in port, or within eight days after her arrival in the United States, if she were absent when sold, she shall be forfeited.<sup>2</sup>

The 22d section of the first statute of registration, that of 1789,<sup>3</sup> provides that ships, not registered, but destined for the bank or whale fisheries, or "from district to district," meaning the coasting trade, may be enrolled; and then follow certain provisions in respect to enrolment. This was afterwards deemed so important, that these two subjects were provided for in distinct statutes; that of Dec. 31, 1792,<sup>4</sup> above referred to, speaks only of registration. And at the same session was enacted the statute of Feb. 18, 1793,<sup>5</sup> which relates only to enrolling and licensing ships for the coasting trade and fisheries. It provides, in the first place, that all vessels which may be registered may be enrolled, and in a

<sup>1</sup> Ch. 52, 2 U. S. Stats. at Large, 296.

<sup>2</sup> Act of 1792, ch. 1, § 16, 1 U. S. Stats. at Large, 287, 295.

<sup>3</sup> Ch. 2, 1 U. S. Stats. at Large, 60.

<sup>4</sup> Ch. 1, 1 U. S. Stats. at Large, 287.

<sup>5</sup> Ch. 8, 1 U. S. Stats. at Large, 305.

similar way, and a certificate given, which differs from the certificate of registry only in substituting the word "enrolment." Under this statute (sec. 8), a vessel that is only enrolled and licensed cannot proceed on a "foreign voyage," without giving up her certificate of enrolment and her license, and being duly registered; and by a breach of this law, the vessel and cargo become liable to forfeiture. From the fear that the whale fishery, which carries a vessel round the world, might be deemed a "foreign voyage" within this prohibition, a custom grew up of considering whalers as not bound on a foreign voyage. By the Statute of 1803, ch. 9,<sup>1</sup> the master of any vessel bound on a foreign voyage is required to give a bond for four hundred dollars, that the certified copy of the list of the crew shall be delivered to the first boarding officer, at the first port in the United States, at which he shall arrive on his return home, and produce the persons, etc. Of this act we shall speak again, in reference to seamen. We advert to it now only to remark that, in 1839, the master of a whaling ship, having incurred the penalty of this bond, and being sued, took the defence that it had been improperly required, as the ship had not been "bound on a foreign voyage."

The question came before Judge Story, and he decided that a whaling vessel was not bound on a foreign voyage, however far it might be the intention of her owners that she should go. Because, a foreign voyage meant a voyage to some definite foreign port or ports, for purposes of trade. No part of the ocean was foreign to us; only a port of another country could be so. And, even if a whaling ship proposed to enter into one or another distant port for the purpose of refitting, or otherwise supplying the exigencies of a whaling voyage, this did not make it a foreign voyage."<sup>2</sup> In 1838, Judge Story also decided that no registered ship can engage in the whale fisheries, without first surrendering her register, and being enrolled and licensed for the fisheries. And he quashed an indictment for a revolt on board such a ship, on the ground that it

<sup>1</sup> 2 U. S. Stats. at Large, 203.

<sup>2</sup> *Taber v. United States*, 1 Story, 1. The action was debt on a bond given by the master of a whaling ship to the collector of the customs for the district of New Bedford. The vessel was about to sail on a whaling voyage, and the bond was given for the purpose of obtaining a clearance. It was held that no action could be maintained on it.

was not an American vessel.<sup>1</sup> But, on the other hand, Judge Betts, in the same year, held that a ship with a register might be legally employed on a whaling voyage without taking out a license.<sup>2</sup> In consequence of these decisions, an act was passed in 1840,<sup>3</sup> providing that whalers, if registered, should be held to have lawful and sufficient papers, and, if only enrolled and licensed, should be deemed as effectually protected as if registered, if the voyages were completed, or until they were completed.

Only vessels of twenty tons or more need to be enrolled and licensed. Those under twenty tons may be licensed only. Stat. 1793, ch. 52.<sup>4</sup>

The 20th section of the Act of 1792,<sup>5</sup> provides that vessels built in the United States after 15th August, 1789, belonging wholly or in part to the subjects of foreign powers, in order to be entitled to the benefits of a ship built and recorded in the United States, shall be recorded in the office of the collector of the district in which the ship is built.

No ship can be registered anew as an American vessel, although of American build, and owned by an American citizen, unless it has been transferred to him by a bill of sale containing a certificate of the former registry. The language of the statute on this subject is: "In every such case of sale or transfer, there shall be some instrument of writing, of the nature of a bill of sale, which shall recite, at length, the said certificate; otherwise the said ship or vessel shall be incapable of being so registered anew." It follows, therefore, that the character and privileges of an American vessel are lost by a sale or transfer without the required instrument in

<sup>1</sup> *United States v. Rogers*, 3 Sumn. 342.

<sup>2</sup> *United States v. Jenkins*, 2 Law Reporter, 146, 148. Both of these cases came up under the act of 1835, ch. 40, which provides that, "if any one or more of the crew of an American ship or vessel on the high seas, etc., shall make a revolt," he and they shall be punished, etc. It was held by Judge Story, that a ship which engaged in a whaling voyage without having surrendered her register, or taken out an enrolment and license, was not an American ship within the purview of this act. The contrary was decided by Judge Betts. He held that the ownership of the vessel might be proved in the same manner as that of any other chattel. See also *United States v. Brune*, 2 Wallace, C. C. 264.

<sup>3</sup> Ch. 6, 5 U. S. Stats. at Large, 370.

<sup>4</sup> 1 U. S. Stats. at Large, 305.

<sup>5</sup> 1 U. S. Stats. at Large, 287, 296.

writing, or are suspended until such instrument is made, and a new register thereupon granted.<sup>1</sup>

It is not very uncommon for private acts to be passed by Congress, authorizing the register of foreign ships which become in some way the property of American citizens, but which are not entitled to registers under the general law.<sup>2</sup>

In 1864,<sup>3</sup> an act was passed entitled "An act to regulate the admeasurement of tonnage of ships and vessels of the United States." The first section of this act provides: "That every ship or vessel built within the United States, or that may be owned by a citizen or citizens thereof, on or after the first day of January, eighteen hundred and sixty-five, shall be measured and registered in the manner hereinafter provided." The fifth section provides, "That the provisions of this act shall not be deemed to apply to any vessel not required by law to be registered or enrolled or licensed, and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." The language of these sections would seem to indicate an intention on the part of Congress to do away with all distinctions between registering, and licensing and enrolling; but we are informed that the practice is to remeasure vessels under this act, to register those that were before registered, and to license those that were before licensed; and in 1865,<sup>4</sup> an act was passed relating to the enrolment and license of certain vessels on the western rivers, and the waters on the northern, northeastern and northwestern frontiers of the United States, providing for the enrolment and licensing of vessels which are, at the time an enrolment and license is necessary, in a district other than that to which they belong.

<sup>1</sup> Act of 1792, § 14, 1 U. S. Stats. at Large, 294.

<sup>2</sup> See 9 U. S. Stats. at Large, Private Acts, p. 2, 66, 154.

<sup>3</sup> Acts of 1864, c. 83, 13 U. S. Stats. at Large, 69. An amendment to this act was passed in 1865. Acts of 1865, c. 70, 13 U. S. Stats. at Large, 444.

<sup>4</sup> Acts of 1865, c. 69, 13 U. S. Stats. at Large, 444.



## SECTION III.

## WHERE AND IN WHAT WAY VESSELS MAY BE REGISTERED, OR ENROLLED.

The statutes of 1792 and 1793, already referred to, are the principal statutes in relation to this subject, and we give them in full in the Appendix. Here we would only remark, that the principal requirements are, that vessels should be registered or enrolled in the district in which is comprehended the port to which the vessel shall belong, which is that, "at or nearest to which," the owner or ship's husband usually resides. That her name shall be conspicuously painted upon her stern. That before registry or enrolment, the collector shall be assured by the oath of the owners, and the certificate of the builder and of surveyors, and, in some instances, of the master, as to the ownership, the build, burden, and description of the ship. And if a ship to be owned by foreigners is to be recorded, in order to obtain the privileges of a ship built and recorded in the United States, similar precautions are required. The oath to be taken by the owner as to the ownership respects only the legal title, so far as concerns citizens of this country; the disclosure of any equitable interests vested in our citizens is not required; but only a denial that any subject or citizen of any foreign prince or state is directly or indirectly interested in the ship, or in the profits thereof.

Previous to the registry of any vessel, the owner and master must give a bond, which is graduated in the amount of the penalty in proportion to the size of the vessel, that the certificate of registry shall be used only for that vessel, and that it shall be delivered up if the vessel be lost, captured, burnt, or broken up, or otherwise prevented from returning to the port to which she belongs.

Steamboats or vessels owned by an incorporated company may be registered or licensed in the name of the president or secretary of such company, without designating the names of the persons composing the company, on oath or affirmation by the president or secretary as to the ownership of such steamboat or vessel; and an enrolment or license so obtained is not vacated or affected by a sale of any share or shares of any stockholder in such company. On the death, removal, or resignation of the president or secretary, a

new register or enrolment is required to be taken out.<sup>1</sup> The provision of this act requiring the president or secretary to make oath or affirm that, to the best of his knowledge and belief, no part of the vessel has been or is then owned by any foreigner, is repealed.<sup>2</sup>

Vessels employed in the whale fishery, if owned by an incorporated company, may be registered or enrolled in a similar way, as long as they are wholly employed in that fishery.<sup>3</sup>

Any vessel which is entitled to registry, and is in a district other than that to which she belongs, may be registered in that district. This, however, is only a temporary register, and must be surrendered and cancelled when she arrives in the district to which she belongs, and a permanent register granted.<sup>4</sup> If the master of a registered vessel be changed, the name of the new master is indorsed upon the register, upon his making oath that he is a citizen of the United States.<sup>5</sup>

If any register be lost, the master of the vessel may make oath to the fact, and obtain a new one.<sup>6</sup>

As every register must state accurately the ownership, and the form and burden of the vessel, if a registered vessel be sold, in whole or in part,<sup>7</sup> to a citizen of this country, or be altered in her form or in her burden by being lengthened or built upon, or from one denomination to another by the mode or method of rigging or fitting, the old register must be delivered up and a new one taken out, or the vessel is no longer entitled to the privileges of a vessel of the United States. If the sale take place in a district other than that to which she belongs, a temporary register may be there given, to be exchanged for a permanent one when she reaches her home port, in the same way as is done in respect to the original register.<sup>8</sup> So, too, if a ship be bought by an agent or attorney for a citizen of the United States, in a district more than fifty miles, taking the nearest usual route by land, from that to which she

<sup>1</sup> Act of March 3, 1825, ch. 99, 4 U. S. Stats. at Large, 129.

<sup>2</sup> Act of 1858, ch. 45, 11 U. S. Stats. at Large, 313.

<sup>3</sup> Act of March 3, 1831, ch. 115, 4 U. S. Stats. at Large, 492.

<sup>4</sup> Act of 1792, ch. 1, § 11, 1 U. S. Stats. at Large, 292.

<sup>5</sup> Act of 1792, ch. 1, § 23, 1 U. S. Stats. at Large, 297.

<sup>6</sup> Act of 1792, ch. 1, § 13, 1 U. S. Stats. at Large, 294.

<sup>7</sup> Act of 1792, ch. 1, § 14, 1 U. S. Stats. at Large, 294.

<sup>8</sup> Act of 1792, ch. 1, § 11, 1 U. S. Stats. at Large, 292.

belongs, she shall be temporarily registered there, until her arrival at her home port.<sup>1</sup>

By the act of June 27, 1797,<sup>2</sup> it was provided, that no registered ship, which should be seized, or captured and condemned, under the authority of a foreign power, or by sale become the property of a foreigner or foreigners, should be entitled to or become capable of, a new register, although the vessel afterwards became American property. There is, however, a proviso that the act shall not affect those who own any ship or vessel at the time of her seizure or capture, or prevent such owner, in case he regain a property in such vessel so condemned, by purchase or otherwise, from claiming and receiving a new register for the same.<sup>3</sup>

It will be seen that the proviso appears to be limited to vessels captured and condemned, and, in that way, passing into the possession of foreigners, and that, as to all others, the statute puts an American ship, which has once become the property of a foreigner, forever after on the footing of a foreign built ship. The statute, however, has been construed otherwise, at least in one case. A valuable vessel belonging to Calais, Maine, was wrecked on the coast of the British provinces, there condemned as wreck, and sold and bought by Englishmen; and the insurers paid for her. But, by a very favorable turn of wind and tide, she was got off at little expense, and found to be but slightly injured. At that time, however, she could not obtain a register as an English vessel, and certainly not as an American vessel, if sold to a new American owner. But her English purchasers brought her to Calais, and there sold her to her original owners, who were the only persons who could buy her and have a register, and who paid for her for that reason but a small price; and, in their hands, she continued to be registered as an American vessel. This case has not been reported.

<sup>1</sup> Act of 1792, ch. 1, § 12, 1 U. S. Stats. at Large, 293.

<sup>2</sup> Ch. 5, 1. U. S. Stats. at Large, 523.

<sup>3</sup> By act of 1804, c. 52, § 2, 2 U. S. Stats. at Large, 297, this proviso is extended to the executors or administrators of the owner.

## SECTION IV.

## OF THE EFFECT OF REGISTRY OR ENROLMENT.

The statutes of registry and enrolment are now somewhat numerous and complicated ; and those of 1792 and 1793 are very long, and go into a great variety of details. For these we must refer to the Appendix, where will be found all these statutes. Here we only remark, that enrolled vessels must be licensed annually for the employment or business in which they are to engage, and this is stated in the license, and they are not authorized by it to engage in any other ; and if they be found with a forged or altered license, or making use of a license granted to any other ship or vessel, the vessel and cargo are forfeited.

These words, however, do not apply to a vessel licensed for one thing and doing another thing under her license ; it would seem, therefore, that such a vessel is only not entitled to the privileges of a vessel of the United States.

If they are in a port other than that to which they belong, at the time when their license expires, they may there obtain temporary registers. All licenses must be renewed within three days after they expire, or within three days after the vessel's arrival at a port, if they expire while she is at sea. A registered vessel may engage in the coasting trade, becoming thereafter subject to the regulations provided for coasting vessels ; and an enrolled and licensed vessel, if bound on a foreign voyage, may be registered.

We have quoted but a small part of the requirements of these statutes. It must, however, be obvious, that all this complication between the registering and enrolling of vessels, and these frequent changes, must cause a great deal of trouble, not to say embarrassment, which should be avoided, if this can be done without sacrifice or greater inconvenience. When they were originally enacted, and for some time afterwards, heavy tonnage duties were levied in certain cases, which were thought to constitute quite an important part of the revenue. These are practically abolished, or nearly so. The details and exact provisions to which we have referred were perhaps necessary to carry all the original objects of these statutes into effect. But it is, we believe, a general opinion among

commercial men, that they are not necessary now, and that all the advantages and securities of our navigation laws would be preserved, and in a far simpler and more convenient way, if but one register were given to all vessels, whether engaged in the foreign or in the coasting trade, or in the fisheries. This might be permanent, and all transfers of title, and all interests and ownership, in part or in whole, and all such changes of employment as it should be thought necessary to notice, might be indorsed upon the register.

Our statutes do not positively require any registration or enrolment of any vessel. The owner of a ship may keep it lying at a wharf until it shall decay there, and not violate any law. But until he registers or enrolls his ship, it is not an American vessel. Nor, indeed, can he carry on in her any trade whatever, because she can have neither the papers nor privileges of a foreign ship, nor of an American ship. If she engages either in the foreign or coasting trade, or fisheries, she is liable to forfeiture. These disadvantages and disabilities, springing from the want of a register, are quite sufficient to make an exercise of the right of obtaining registry universal. A similar practice exists, under similar requirements, in nearly all commercial and civilized nations. And probably no vessel of any magnitude now sails the ocean without having documents on board to prove her nationality and ownership.

It may be well to remark, that an act of Congress passed March 5, 1856,<sup>1</sup> authorizing the Secretary of the Treasury to change the name of any vessel, when, in his opinion, good cause exists therefor, has been repealed.<sup>2</sup>

Some interesting questions under these and later registry acts have passed under adjudication, beside those already presented. Stating these chronologically, we begin with a case which occurred the year after the statute of enrolment was passed.<sup>3</sup> A schooner, licensed as a coaster, cleared for St. Mary's in Georgia, but went to Port-de-Paix, and was there sold to a Frenchman by the master, by order of the owner. Upon her return to South Carolina, she was libelled, and decreed to be forfeited; the court recognizing a

<sup>1</sup> 11 U. S. Stats. at Large, 1.

<sup>2</sup> Act of 1859, ch. 8, 11 U. S. Stats. at Large, 375.

<sup>3</sup> *United States v. Sch. Hawke*, Bee, 34.

distinction between the two acts, because that for registering permits sales of vessels at sea, or in a foreign port to foreigners, while the act for enrolment and license prohibits a sale to foreigners altogether. But it was also said that a licensed owner might dispose of his vessel as he would, upon delivering up his license.

In 1805, upon a sale of a licensed vessel to an alien in Philadelphia, it was said,<sup>1</sup> that if a *sea vessel* (meaning a registered vessel) is assigned to a foreigner, she loses the privileges of an American bottom; but if a *coasting vessel* (meaning one enrolled and licensed), be so sold, the sale is not void, but the vessel is liable to forfeiture.

In 1806,<sup>2</sup> a vessel was forfeited because a false oath was taken to procure a register. The interesting question arose, when and by what means the property in a forfeited vessel vested in the United States. And it was held that the United States might elect to proceed against the vessel as forfeited, or against the party taking the false oath for its value. But that unless, and until, process for forfeiture is begun, the property in the vessel does not vest in the United States. Therefore, the vessel having been sold to the assignees of the party taking the false oath, and they having sold the vessel, and received the proceeds in trust for his creditors, the United States could not maintain an action for money had and received against the assignees.

In 1807,<sup>3</sup> a ship, while at sea, was sold in part to an American citizen, but was not registered anew. And, after the arrival of the ship in Philadelphia, she was resold by the purchaser to the original owners, before any report or entry. And it was held that the ship did not thereby lose her privilege as an American ship, or become subject to foreign duties.

In 1814,<sup>4</sup> of two partners in a commercial house doing business in New York, one, Lenox, resided in New York, the other, Maitland, was a resident merchant of Great Britain. To obtain a register, Lenox made oath in New York, that he, "together with W. Maitland, of New York," were the only owners. At that time,

<sup>1</sup> *Philips v. Ledley*, 1 Wash. C. C. 226.

<sup>2</sup> *United States v. Grundy*, 3 Cranch, 337.

<sup>3</sup> *United States v. Willings*, 4 Cranch, 48, 4 Dall. 374.

<sup>4</sup> *The Venus*, 8 Cranch, 253.

Maitland was domiciled in Great Britain. The court held that the vessel was subject to forfeiture, although the oath was taken innocently, and in ignorance of the character imparted to Maitland by his residence in England.

In 1815,<sup>1</sup> it was decided, that, if the master of an American ship be an American citizen resident abroad, the ship does not thereby lose her right to pay only domestic duties. But that if such a person be the owner of a vessel, it cannot be entitled by registry to the privileges of a vessel of the United States.

In 1818,<sup>2</sup> it was decided, in a somewhat curious case, that the provisions of the 27th section of the Act of 1792,<sup>3</sup> that a ship shall be forfeited if any certificate of registry or record shall be fraudulently or knowingly used for her, to the benefit of which she is not then actually entitled, apply as well to vessels which have never been registered, as to those to which registers have been previously granted.

In 1824,<sup>4</sup> it was held, that, if a registered vessel be transferred in a foreign port to an alien, for the purpose only of evading the revenue laws of a foreign country, and with an understanding that when this purpose is accomplished she shall be reconveyed to the original owner, the vessel is liable to forfeiture under the 16th section of the act. And if she continues to use her original register after such transfer, she is liable to forfeiture under the 27th section.

In 1826,<sup>5</sup> it was decided, that, as the original register is required by law to be transmitted to the register of the treasury, when a vessel is lost; and, as this register is to be then cancelled, but not destroyed, it is a document which the law requires to be deposited and preserved in the register's office. And it was also said, that, in a time of universal peace, the register is the only document which must be on board, to satisfy a warranty of national character.

In 1835,<sup>6</sup> occurred a case of some interest, from its peculiar facts. The United States sought to enforce a forfeiture against a brig, of which it was alleged that a Spaniard, resident in Cuba, was an owner or part-owner, under cover of the name of an American

<sup>1</sup> *United States v. Gillies*, Pet. C. C. 159.

<sup>2</sup> *The Neptune*, 3 Wheat. 601.

<sup>3</sup> Ch. 1, 1 U. S. Stats. at Large, 287, 298.

<sup>4</sup> *The Margaret*, 9 Wheat. 421.

<sup>5</sup> *Catlett v. Pacific Ins. Co.* 1 Paine, C. C. 594.

<sup>6</sup> *United States v. The Brig Burdett*, 9 Pet. 682.

citizen. Many circumstances indicated this, and had a strong tendency\*to prove it. But the court said, that, the prosecution being highly penal, the infractions of the law must be established beyond reasonable doubt. And that, although most ingenious frauds are often practised under our revenue laws, such acts cannot alter the established rules of evidence.

In 1839,<sup>1</sup> it was found that enrolments in a certain custom-house were occasionally made, as matter of convenience, on the oath of the master only. But, on such a case coming before the District Court of Maine, it was held that such an enrolment was wholly void, and could not confer upon the vessel the rights and privileges of a vessel of the United States.

In 1846,<sup>2</sup> a case came up under the first section of the Act of March 1, 1817, (3 U. S. Stats. at Large, 351,) which provides that goods shall not be imported from any foreign port, except in vessels of the United States, *or in such foreign vessels as belong to the citizens of that country of which the goods are the growth*, etc. The question arose, whether goods, the growth or production of the East Indies, could be brought to this country in English ships. It was held that they might, because by country was meant the entire nation, and not merely a section or portion of territory belonging to the nation.

It is important to remember, that presentation to the custom-house for registration is wholly voluntary; and that the owners of the ship present it for registration, only to secure to themselves certain benefits or privileges thereby. For this circumstance assists in determining some of the numerous and difficult questions, which have arisen in reference to the force and authority of the register, as a record, as public notice, or as evidence of ownership or interest, or the want of it. Thus, if one claims to prove his title by the fact that his ownership appears on the register, it may be answered that he caused it to be there by his own act, and cannot in this way make evidence for himself.

On the other hand, if he wishes to prove his interest when his name is not there, or if another wishes to charge him as owner by proof outside of the register, which does not show him to be an owner, it may be said that registration is no necessary incident to

<sup>1</sup> United States v. Bartlett, Daveis, 1.

<sup>2</sup> United States v. The Ship Recorder, 1 Blatchf. C. C. 218.



ownership, and therefore the want of registration or of any name in the register justifies no conclusion against the ownership. And, in general, as the law simply offers to registered ships certain privileges, which are exactly defined, it is not willing to recognize, in the fact of registration, any other efficacy than that of imparting these privileges, or to permit the absence of registration to have any other effect than merely to prevent these privileges from attaching to the ship.

On the other hand, registration is founded on the oath of the party, and is a solemn act of the law, and it is not reasonable to make it wholly insignificant. And, an eminent judge in England (Lord *Eldon*), has intimated that the registry laws of that country have, as one of their purposes, the identification of property.<sup>1</sup> Recently, in England, a person injured on a ship in dock, by the negligence of the ship-keeper, sued the defendant as owner and employer of the ship-keeper. There was no evidence of this but the fact that his name stood in the register as owner. *Blackburn and Lush*, J. J., held that this was sufficient; *Mellor*, J., dissenting.<sup>2</sup>

The questions of this kind which have arisen, are very many, and very various. The whole subject of registration of ships is unlike anything else required by the law, or known to the law. The register has been offered by a party litigant in cases of sale of ship or goods, of contracts of affreightment, of insurance, of forfeiture, or for breach of law. It would be very difficult to exhibit these questions, or the principles which may determine them, aside from the cases in which they arise. And we have preferred to present them together in a note to this passage, in which all the cases are cited and classified, as well as we have been able to do it, and those of most interest examined at some length.<sup>3</sup>

<sup>1</sup> *Ex parte Yallop*, 15 Ves. 60.

<sup>2</sup> *Hibbs v. Ross*, Law Rep. 1 Q. B. 534.

<sup>3</sup> It appears to be well settled in the English courts, that the register is not to be considered as a public document, or record, but a private instrument, and the mere declaration of the party making it. *Flower v. Young*, 3 Camp. 240; *Pirie v. Anderson*, 4 Taunt. 652, 657 (per *Heath*, J.). The object of the British registry acts being to secure to the ships of Great Britain certain privileges, and not to create new evidence of ownership in vessels. *Bayley*, J., in *Tinkler v. Walpole*, 14 East, 226, 233. See, however, the remark of Lord Chancellor *Eldon*, in *Ex parte Yallop*, 15 Ves. 60, that the Registry Acts of 26 Geo. 3, c. 60; 34

Geo. 3, c. 68, "were drawn upon this policy that it is for the public interest to secure evidence of the title to a ship, from her origin to the moment in which you look back to her history."

Some of the earlier American cases seem to countenance the doctrine, that the register is a public record or title. Thus, in the *United States v. Johns*, 4 Dall. 412, which was a prosecution under a criminal statute, a certified copy of a *manifest of cargo* was admitted in evidence, on the ground, apparently, that the book of manifests, kept by the collector in conformity to the impost laws, was a record.

So in *Coolidge v. New York Firem. Ins. Co.* 14 Johns. 315, the court say:—"The record required to be kept by the collector, of the registry of ships or vessels, is such a one, that a copy of it, compared with the original by a witness who can testify to its being a true copy, would be good evidence of the facts it sets forth."

But the great majority of the American cases evidently take the same ground as the leading English authorities, and it is expressly stated by Mr. Justice *Saffold*, in *Jones v. Pitcher*, 3 Stew. & P. 135, 155, who seems to doubt the authority of *United States v. Johns*, *supra*, that the register is not entitled to more credence in this country than in Great Britain.

It follows from this *ex parte* character of the registry, that it is not even *prima facie* evidence to charge those who are not shown to be parties to it, by their own act or assent, although their names appear upon its face. *Flower v. Young*, *supra*; *Tinkler v. Walpole*, 14 East, 226; *Baldney v. Ritchie*, 1 Stark. 338; *Jones v. Pitcher*, *supra*; 1 Greenl. Ev. § 494; *M'Iver v. Humble*, 16 East, 169; *Fraser v. Hopkins*, 2 Taunt. 5; *Cooper v. South*, 4 Taunt. 802; *Pirie v. Anderson*, 4 Taunt. 652; *Rands v. Thomas*, 5 M. & S. 244. See, however, *Stokes v. Carne*, 2 Camp. 339, where Lord *Ellenborough* seemed to think, that, where no notice of an intent to deny the ownership was previously given, the register might be *prima facie* evidence to charge several part-owners, when obtained on the oath of one of them only, although admitting that, had the facts of the case been different, he should have required stricter proof. In *Myers v. Willis*, 17 C. B. 77, 33 Eng. L. & Eq. 204, 209, *Jervis*, C. J., said:—"It is admitted that the law is now different from what it was formerly, when it used to be considered that the register only was to be looked at, and that it alone was conclusive as to the ownership of the vessel, and conclusive therefore of the liability of the party appearing thereon as owner; but it is now settled that the question of liability in these cases is to be determined in the same way as in all other cases of contract, by ascertaining with whom the contract was made." This case was affirmed in the Exchequer Chamber, 18 C. B. 886, 36 Eng. L. & Eq. 350. See also *Hackwood v. Lyall*, 17 C. B. 124, 33 Eng. L. & Eq. 211; *Mitcheson v. Oliver*, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219; *Brodie v. Howard*, 17 C. B. 109, 33 Eng. L. & Eq. 146; *Mackenzie v. Pooley*, 11 Exch. 638, 34 Eng. L. & Eq. 486; *Howard v. Odell*, 1 Allen, 85.

Against the person on whose affidavit it is obtained, the registry may be evidence of the facts recited, being his own declaration made under the sanction of an oath. *Cooper v. South*, *supra*; *Pirie v. Anderson*, *supra*, per *Chambre*, J.; *Flower v. Young*, *supra*; *Hacker v. Young*, 6 N. H. 95; *Ligon v. Orleans Nav. Co.* 19 Mart. La. 682; as in favor of his creditors, *Bixby v. Franklin Ins. Co.* 8

Pick. 86. But to make it so, he must be connected with it by proper proof of the oath. *Smith v. Fuge*, 3 Camp. 456; *Jones v. Pitcher*, *supra*. And, where the affidavit had been destroyed by fire, Lord *Ellenborough* held that the register book was not sufficient as secondary evidence of its existence, but that witnesses must be called who had seen the affidavit, and knew it to have been made by the party sought to be charged. *Teed v. Martin*, 4 Camp. 90.

So, the register is not by itself evidence, in a suit between third parties, of the national character of the vessel being *res inter alios acta*. *Reusse v. Meyers*, 3 Camp. 475. And it does not affect the question of property in such a case. *Bixby v. Franklin Ins. Co. supra*.

As to some of the facts sworn to, such as the national character of the ship at the time of registry, we apprehend that the registry and affidavit are *conclusive* against the party making them, he being estopped to deny what he has affirmed under oath. But as to the fact of *ownership*, the registry in this country is only *prima facie* evidence against him. *Dame v. Hadlock*, 4 Pick. 45; *Ring v. Franklin*, 2 Hall, 1; *Weston v. Penniman*, 1 Mason, 306; *Leonard v. Huntington*, 15 Johns. 298; *Bixby v. Franklin Ins. Co. supra*; *Colson v. Bonzey*, 6 Greenl. 474; *Lord v. Ferguson*, 9 N. H. 380.

The reason of this is, in the first place, that the oath required by the American registry act has been determined to apply only to the *legal* ownership, so that registry in the name of one person is consistent with an equitable title in another. *Weston v. Penniman, supra*. "The oath required by the Registry Act of 1792, to be taken by the owner," says Mr. Justice *Story*, in this case, "respects only the legal ownership of the property, and does not require a disclosure of any equitable interests invested in citizens of the United States, but only a denial that any subject or citizen of any foreign prince or state is directly or indirectly interested by way of trust, confidence, or otherwise, in the ship, or in the profits or issues thereof. It is sufficient that the legal interest is truly stated; and if there be any equitable interest or trust in favor of any other citizen of the United States, no fraud is committed upon the law. Suppose a mortgage made of a registered ship, may not the mortgagee truly declare himself the legal owner, notwithstanding an equitable right of redemption in the mortgagor?"

See also that a mortgagee may take out a registry in his own name. *Ring v. Franklin*, 2 Hall, 1.

Such being the case, it follows that the legal owner, as a mortgagee or trustee, is not estopped by the register to show that the actual beneficial ownership is in a third party, and consequently it is not conclusive evidence against him. See *Plymouth Cordage Co. v. Sprague*, Sup. Jud. Ct. Mass., 2 Law Reporter, 365. There is an early Connecticut case, *Starr v. Knox*, 2 Conn. 215, 222, which maintains a contrary doctrine, namely, that registry is such a publication of ownership to the world as will make the party to it liable as owner, unless the qualified nature of his title as mortgagee appears on the register itself by indorsement or otherwise. But, from the authorities above cited, it appears that this would not now be considered law.

Under the British Registry Acts, 8 & 9 Vict. c. 89, § 37, 38, and 45, the question has arisen whether, if a party who is the registered owner makes a contract to sell the ship, which agreement is not registered, and subsequently transfers the

vessel, for a valuable consideration, to a person having notice of the former agreement, who has it duly recorded, the party making the first agreement has any remedy against the ship or its proceeds. In *McCalmont v. Rankin*, 8 Hare, 1, 2 De G., M. & G. 403, it was held that he had not. So in *Coombes v. Mansfield*, 3 Drewry, 193, the builder of a vessel mortgaged her to A, and afterwards by a second mortgage to B. He afterwards had her registered in his own name. The mortgages were never recorded. The ship was then transferred by an absolute bill of sale to B, and a registry taken out in his name. This was only meant to be a mortgage. To obtain more money, and to pay off B, the builder agreed with B that he should transfer the vessel to C. This was done, and C's name appeared on the registry as owner. C knew of the mortgage to A. Held, that A had no claim against C. The court said: "Now it is clear that, if this were any other species of property, land or leaseholds, or indeed any other kind of property, any person taking by a deed an assignment of the legal interest, with notice at the time of a prior equitable charge, would take only subject to that charge. The question is, whether the ship registry acts preclude the application of that doctrine. The cases in this court are numerous, and they clearly establish this: that a mere contract in writing, however precise and regular, for the purchase and sale of a ship, does not entitle the purchaser to any relief, either as against the vendor, or as against any other person, who, coming afterwards, with knowledge of the contract, takes an assignment of the ship and has it registered."

In *Armstrong v. Armstrong*, 21 Beav. 78, shares in a ship, purchased with A's money, were registered in B's name. After A's death, B entered into an agreement with his representatives admitting their right, and for a valuable consideration agreeing to sell the shares at the end of twelve months, and to account for the proceeds. B accordingly sold to C. Held, that though the ship registry act prevented the representatives enforcing any right against the ship, still they were entitled to recover the purchase-money in the hands of C. In *Parr v. Applebee*, *Kt. Bruce*, L. J., 35 Eng. L. & Eq. 218, the owner of a ship, being indebted to a firm, mortgaged it to A B, one of the partners, to secure the debt. This mortgage was duly recorded. Afterwards, he executed a further charge to A B for money due from himself, or from him and his partners, from time to time, to the firm of which A B was a member. This was not registered. He afterwards executed a further charge in favor of other persons, who registered their security. The court held that the unregistered charge was inoperative. See also *Lindsay v. Gibbs*, 2 Jur. N. S. 1039, Ch., 22 Beav. 522. The case of *Whitfield v. Parfitt*, 4 De Gex. & S., 240, 6 Eng. L. & Eq. 48, may seem to contravene the doctrine laid down in *Coombes v. Mansfield*, *supra*; but they are entirely consistent. In *Whitfield v. Parfitt*, the plaintiff, the registered owner, transferred the vessel to the defendant by an absolute bill of sale. There was indorsement on the bill a memorandum of the same date as the bill itself, that, on the plaintiff's repaying to the defendant, the sum of £ 100, with interest, the bill of sale should be null and void. The bill of sale was registered, but the indorsement was not. Subsequently, the defendant transferred the vessel to a third party, but this was never registered. It was held, that the plaintiff was entitled to redeem. The registry acts do not apply to the cargo or freight. *Armstrong v. Armstrong*, 21 Beav. 78; *Langton v. Horton*, 5 Beav. 9. Nor do they prevent a lien being created on a

certificate of original registry deposited by an unregistered owner to secure advances made for the use of the ship. *Clarke v. Batters*, 1 Kay & Johns. 242. The registry of a ship is, however, conclusive as to the ship being in a fit state to be registered under the 8 & 9 Vict. c. 89, although there may be evidence to show that the ship was not so completed at the time of the registry. *Coombes v. Mansfield*, 3 Drewry, 193. Under the former acts a distinction was taken by Lord Eldon, between trusts created by the act of parties, and those arising by implication of law. The former were held to be within the acts, the latter not. Hence, under them, the registered owner would have been estopped to show an equitable title in another, where it did not appear on the registry. *Curtis v. Perry*, 6 Ves. 739; *Ex parte Yallop*, 15 Ves. 60, 68. See also, as to the equitable ownership under these laws, *Ex parte Houghton*, 17 Ves. 251; *Dixon v. Ewart*, 3 Meriv. 322; *Mair v. Glennie*, 4 M. & S. 240; *Robinson v. Macdonnell*, 5 M. & S. 228; *Hay v. Fairbairn*, 2 B. & Ald. 193; *Monkhouse v. Hay*, 2 Brod. & B. 114; *Lister v. Payn*, 11 Simons, 348; *Thompson v. Smith*, 1 Madd. Ch. 395.

2d. From its very nature, the registry can only be evidence of ownership at the time it was made, and the continuation of the exclusive title in the parties, whose names appear on its face, is a mere presumption of fact, liable to be disproved by competent evidence of a subsequent transfer to others.

But, by the provisions of the British acts, as we shall see hereafter, such a change of ownership, unless inserted in the registry, was null and void; hence, the registry became, as against all the world, conclusive evidence of the state of the title at any moment subsequent to its execution, and therefore conclusive against the existence of any legal ownership in other persons, at any such time. *Camden v. Anderson*, 5 T. R. 709; *Westerdell v. Dale*, 7 T. R. 306; *Marsh v. Robinson*, 4 Esp. 98; *Curtis v. Perry*, *supra*; *Ex parte Yallop*, *supra*; *Ex parte Houghton*, *supra*; *Mestaer v. Gillespie*, 11 Ves. 621, 625.

But the registry acts do not preclude the persons who are named in the certificate of registry from showing how, and in what proportion, they are respectively entitled. *Ex parte Jones*, 4 M. & S. 450. And the statutes, having been passed for the reasons of domestic policy, have no application to foreigners, whose rights are to be determined by the law of nations. Therefore, the foreign part-owner of a privateer is liable for damages decreed against the owners generally, although his name is not on the registry. *The Nostra Signora de los Dolores*, 1 Dods. 290.

In this country a transfer, against the provisions of the registry act, may be valid and binding, and therefore the registry can never be conclusive evidence against parties to it, that the legal title is in them at any moment, except that when it is made. See cases before cited, and especially *Colson v. Bonzey*, *supra*. See also the case of *Vinal v. Burrill*, 16 Pick. 401, which was assumpsit with a count on an *insimul computassent*, by one claiming to be the ship's husband, for disbursements relating to the ship on a certain voyage, against several defendants as joint owners. In this case, the court held, that, although the registry was in the name of one of the defendants only, the plaintiff might introduce parol evidence to show that the others were jointly interested with him in a particular voyage, and liable as owners *pro hac vice*.

The precise ground of this ruling does not appear in the decision; it would seem, on the whole, as if the judges were of opinion that the ownership, under the registry act, means only the general property or title, and does not exclude a transient and special property in another, such as an ownership *pro hac vice*.

On the other hand, it may be that the agreement between the registered owner and the others was subsequent to the registry, and that the court meant merely to affirm the principle that registry is not conclusive evidence of ownership, and it is cited as an authority to this point, by Perkins in his notes to Abbott.

As the registry in this country is not conclusive evidence of property against those who are parties to it, and not even *primâ facie* evidence between third parties, it follows as a matter of course that it is not, by the force of the statute, made *exclusive* evidence of ownership in such cases. *Lord v. Ferguson*, 9 N. H. 380; *Hozey v. Buchanan*, 16 Pet. 215.

And it has been held, that possession and assertion of ownership, and notoriety, are stronger evidence of property in a ship than registry without possession. *Bas v. Steele*, 3 Wash. C. C. 381, 390. See also *Weaver v. The S. G. Owena*, 1 Wallace, Jun. 359, 366.

In Great Britain, the distinction has been taken that although property in a ship may be proved, as in the case of any other chattel, at least *primâ facie*, by proof of possession and claim of title, proof of registry is necessary to make such evidence admissible. *Pirie v. Anderson*, *supra*. In an earlier case, however, where the plaintiff proved possession under claim of title, Lord *Ellenborough* held this to be *primâ facie* sufficient, and that he need not produce any evidence of registry, although it came out in cross-examination that his title was derived from a bill of sale. A prior registry in the name of a third party, one Vincent Williams, and a subsequent register to the same person, upon a sale by decree of a vice court of admiralty, were offered in evidence to disprove the ownership by the defendants; but his lordship considered that they were both perfectly consistent with a title in a third person in the interval, agreeably to the averment in the declaration, and did not render any further proof by him requisite. *Robertson v. French*, 4 East, 130. With respect to the last part of this ruling, Lord *Ellenborough* may have considered that the defendants having shown by their own evidence that Williams must have parted with his title, at some time or other in the interim, it came to the same thing, as to the period, in question, as if they had offered no evidence whatever, leaving the presumption arising from the plaintiff's possession in full force. It seems to us likewise, that the registries in this case were by themselves *res inter alios actæ*, and consequently, if objected to, could not have been admitted at all in evidence of facts stated therein, as was subsequently held by the same learned judge in *Reusse v. Meyers*, 3 Camp. 475, before cited. But we cannot help thinking, that, since the claim of title appeared to be founded on a bill of sale, the latter should have been produced by the plaintiff as the better evidence, as was objected by the counsel for the defendants; and that any such proof, without some evidence of compliance with the registry laws, was contrary to the policy of those acts, the true rule being that stated in the later case, above cited. See also *Thomas v. Foyle*, 5 Esp. 88, where the same learned judge permitted the plaintiff to prove his ownership by

parol, although it was objected that the bill of sale should have been produced in evidence, no attempt being made to set up any title elsewhere.

Lastly, is the register *primâ facie* evidence of ownership in favor of parties to it? In England, a practice of admitting it as such seems, from the language of Lord *Ellenborough*, at one time to have prevailed, and at *Nisi Prius*, *Bayley, J.*, remarked, in the case of *Tinkler v. Walpole*, *supra*, "This is very different from the case of a person publicly asserting that he is owner, by the act of registering a vessel in his own name; that may be *primâ facie* evidence for him that he is owner; because he thereby publicly challenges all persons that he is so." But Lord *Ellenborough*, in *Flower v. Young*, denied that such could be the case; the registry amounting to nothing more than the declaration of the party, he remarked, was clearly not admissible in his favor. And the court were of the same opinion in *Firie v. Anderson*, *supra*, *Gibbs, J.*, saying: "It was strongly urged for the defendant, that, because the title cannot be complete without the register, therefore the register shall be *primâ facie* evidence of the title; that does not at all follow. If the legislature makes an act necessary to complete a title, it does not thereby make that act alone to be proof of the title; if such were the law, a man might make for himself a title to anything in the world. With respect to the dictum of *Bayley, J.*," (cited *supra*,) "I am satisfied that he said that, because he would not take on himself to decide a point which had never been decided, which was not the point raised at *nisi prius*, and which it was not necessary to decide in that case." The argument, here stated to have been used in favor of the admission of the evidence, has no force in this country, where registry is not made necessary to complete a title; nevertheless, we should consider the question as more open to doubt than these cases left it in England.

In the case of *The Mary*, 1 Mason, 365, a similar objection was made. But *Story, J.*, held, without reference to its validity, that the defendants were, under the circumstances, estopped from making it by their own acts on record. And it was held by the court in *Sharp v. Unit. Ins. Co.* 14 Johns. 201, that the registry was not *primâ facie* evidence in favor of the plaintiffs, whose names did not appear on it, as proof that they were *not* owners of the ship. But it is to be remarked, that this ruling does not seem to have been requisite to the decision of the case. The question being, whether the plaintiffs should be allowed to make use of the register, to rebut the presumption of ownership arising from their having procured a policy of insurance on a ship in their own name, for the purpose of recovering back the premium. This case cannot, therefore, be considered as of authority otherwise than as a dictum. See also *Ligon v. Orleans Nav. Co.* 19 Mart. La. 682.

On the other hand, in *Weaver v. The S. G. Owens*, 1 Wallace, Jun. 359, 365, the court take no such distinction between the effects of the register as evidence *for* and *against* those in whose name it stands, but hold generally, that in a question of ownership *inter partes* it is *primâ facie* evidence of title in the person in whose name the ship is registered, liable to be rebutted by proof of actual ownership in another, whether temporary or absolute, as lessee or vendee.

See, however, *Lincoln v. Wright*, 23 Penn. State, 76. The action was brought against the plaintiffs in error for supplies furnished by the defendants for a vessel. The case turned on the point, whether the plaintiffs were owners at the

time the supplies were furnished. There was evidence of a sale prior to the time, but it was shown that subsequently the plaintiffs made oath at the custom-house that they were the sole owners, and it was held that this evidence was admissible. The court said: "A vessel may be sold, and, because the vendor retains the legal title as security for the purchase-money, he has her registered in his own name; a mortgagee may do the same thing, while the mortgagor keeps the possession; or an unconditional sale may be made, and the register be left unchanged. For these reasons, a certificate of the register is no evidence in favor of the person named therein as owner, nor in actions between other parties. It will not establish an insurable interest in the registered owner as against an underwriter, nor will it disprove such interest in the assured, when the policy has been taken for the benefit of other persons. Neither would it be any defence whatever, in an action for supplies against one for whose profit the ship is navigated, to show that she is registered in another name. But all this does not prevent us from saying that a man's declaration on oath is some evidence *against* him of the facts therein asserted. It is not conclusive, certainly. The defendants were permitted to show, if they could, that they had no actual interest in the ship; but the jury did not think they succeeded, and if they were wronged in this we cannot help it." See *The Steamboat Superior*, 1 Newb. Adm. 176. In a criminal case, where it is necessary to prove that the person indicted was on board a ship owned wholly or in part by an American, it has been held that the register is not even *prima facie* evidence of such ownership. *United States v Brune*, 2 Wallace, C. C. 264.



## CHAPTER III.

## OF THE TRANSFER OF A SHIP BY SALE.

## SECTION I.

## OF THE SALE OF A SHIP WITHOUT WRITING.

It has been already remarked, that a ship is a chattel, and can only be regarded as such by a system of law which divides all property into real (or land, or of the land), and personal, which includes whatever is not real. It would seem, therefore, that the sale of a ship should be, so far as that law is concerned, governed by the same rules which are applied to the sales of other personal property. But these rules neither prescribe nor prefer any method or form, nor do they require any special or peculiar evidence of the few things which are essential to a sale of a chattel.

The English Statute of Registry of 26 Geo. 3, passed in 1786, was in force when our own statute of 1792<sup>1</sup> was enacted. By its 16th and 17th sections it was provided, with much minuteness, that "every alteration in the property of any ship or vessel" should be indorsed on the certificate of registry before witnesses, and should itself be registered; and that at every transfer the certificate of registry should be "truly and accurately recited in words at length in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void, to all intents and purposes." In speaking of this, *Story, J.*, said: "To entitle ships to be registered, and to be deemed ships of the United States, with the privileges and exemptions of such ships, it is necessary that the transfer should be made according to the form prescribed in the registry acts; that is to say, that it should be made by some instrument in writing, which shall recite at length the certificate of registry; but the acts do not declare any other transfer void and illegal, but simply deny to ships transferred in

<sup>1</sup> Ch. 1, 1 U. S. Stats. at Large, 287.

any other manner the privileges of ships of the United States, and deem them alien or foreign ships. *In this respect our acts differ from the English registry acts.*"<sup>1</sup>

It was remarked in a former section, that our statutes of registry copied the English statute substantially, and almost literally, with one important exception. That exception is the omission of the clauses just quoted. This is the difference to which Mr. Justice Story refers. It may be stated briefly thus. The English statute makes a transfer of a ship wholly void, if not in writing and recorded; our statute only denies to a vessel transferred without writing or registry the privileges of an American ship. It is very important to determine, if we can, the cause of this difference.

It is impossible, or at least unreasonable, to attribute this difference to accident or inadvertence. The care with which our statute is drawn, the obvious purpose and utility of every other departure from the English statute, and the better adaptation of our statute to our own wants and circumstances, by reason of those departures, forbid the supposition, if it were otherwise admissible, that the framers of our statute did their work with so little thought or care or knowledge as to account for this important difference in this way. These clauses must have been known to the framers of our statute.

It is equally impossible to suppose that these provisions were omitted because they were unimportant and useless, or because we did not need them as much as they did in England. It must be remembered that England had then no system whatever of recording transfers, even of land; we had already gone before her in this respect, and the utility of the change was universally admitted throughout our country. And yet, even in England, the registry of the transfer of ships was deemed necessary, and no reason existed for it there, which did not exist in equal force here. All this, our legislators of 1792 knew; and in addition to this, there were those among them who must have been aware of the ancient and universal rule of the law merchant, which asserts the propriety, at least, of transferring a ship by a written document. In view of all these facts, it is impossible to suppose that these important provisions of the English statute were omitted in our own,

<sup>1</sup> *Weston v. Penniman*, 1 *Mason*, 317.

except intentionally, deliberately, and for what was at that time deemed sufficient reason.

It then becomes desirable to ascertain this reason, if we can. We think it was a doubt whether Congress had any constitutional power to enact these provisions. There is in the Constitution of the United States no provision or expression which could give Congress this power, unless it be the clause in the eighth section of the first article, which mentions, among the powers given to Congress, that which permits them "to regulate commerce with foreign nations, and among the several States." And the question is, whether a just construction of this language could authorize Congress to regulate the sale or transfer by mortgage of our own ships in our own ports. It is true that a ship is an instrument of commerce, and has no other purpose or value. But it cannot be said that the power to regulate commerce means a power to regulate the ownership, transfer, and evidence of title of everything which is used in commerce.

It is true that this section closes the enumeration of powers with the general provision "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." But this provision could not have been intended either to enlarge or to define the powers enumerated in the preceding part of the section, but only to give to those powers the fullest efficiency. Perhaps a distinction might be taken, which would bring the ship, after she was enrolled, and, as it were, thus delivered up into the control of the United States government, within its right to regulate the evidence of title and of transfer; and possibly this might be extended to the ship as soon as launched and completed; leaving her, previously, to the exclusive control of the State in which she belongs.

We are quite clear, that the framers of our statute of registry omitted these peculiar provisions of the English statute, because they deemed it unconstitutional to include them. And this inference is much strengthened by the fact that they did expressly and carefully provide for transfer by writing, certified and registered, so far as they were certain that these provisions related to commerce; that is, so far as related to the privileges, exemptions, or obligations of the ship while engaged in commerce; making such transfer and registry indispensable to her continuing to possess the rights of an

American ship. But here they stopped. And we think that they stopped here, because they supposed that they had now exhausted all their authority on this subject derivable from the power to regulate commerce, and were, therefore, obliged to leave all that lies beyond this, as all regulation of title, transfer, and evidence of property in the ship when sold or mortgaged as mere merchandise or security, to the State government, which takes the ship up in all those relations in which it is property only.

Still it may be said, that this was the rigorous and cautious construction which would result from the principle that the Constitution was an adverse instrument, and therefore to be construed *strictly*,—but not the reasonable construction which would be justified by the supposition, that the Constitution was an instrument favorable to all parties, and should be, if not enlarged, certainly not restrained by construction; and such seems to have been hitherto the construction of this very clause, in all other cases.

But this question, which we admit to be a difficult one, has a very great importance in its reference to the Act of 1850, ch. 27.<sup>1</sup> For this statute has changed, or, at least, has attempted to change, the law on this subject, very materially. It enacts, in substance, precisely those provisions which the Congress of 1792 refused to enact. As the statute is copied in the Appendix, we state here only that it declares that “no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of customs where such vessel is registered or enrolled.”<sup>2</sup> It might possibly be argued that this statute meets only the case of a transfer of a ship by “bill of sale” or other “conveyance”; and therefore an oral transfer, with delivery of possession, would be as valid as it was before. We should say, however, that the word “conveyance” must be construed as equivalent to “transfer,” and

<sup>1</sup> 9 U. S. Stats. at Large, 440.

<sup>2</sup> This act is held to be constitutional in *The Brig Martha Washington*, U. S. C. C. Maine, 25 Law Reporter, 22. Its constitutionality is doubted in *The Parker Mills v. Jacot*, 8 Bosw. 161; and see cases *infra* p. 60, note 5.

that such oral transfer would be void, excepting under the proviso of this statute. Under this proviso, a transfer of any kind, which before the statute was adequate to pass the property in the ship, is now perfectly valid in reference to persons having notice of it. And if the statute be, for the reasons we have presented, or for any reasons, unconstitutional, the law on this subject stands as it did before. It becomes, therefore, important to consider whether any transfer of a ship, in good faith and for valuable consideration, without writing or record, would be effectual to pass the property of the ship, either under the exception of this statute, or on the supposition that it is unconstitutional, and therefore void.

In the first place, we consider it certain that a transfer by written document is the ancient, customary, and proper way ;<sup>1</sup> but more than this may be necessary to make it the only legal way. On this question we must begin by remembering that a ship is personal property, a chattel, capable of delivery from seller to buyer. Now the rule of the common law, which prevails in respect to every species of personal property, is quite certain ; it is, that an oral sale for a valuable consideration, with delivery of possession, passes the property in the thing sold, absolutely, and is itself a completed transaction, which no writing, however convenient, or even requisite, on other grounds, can make more perfect. If we begin with this rule, the obvious question suggested is, whether this rule applies to shipping also ; and the equally obvious answer is, that it must so apply, unless there be some rule or provision of law which makes the exception. The parties, however, at the time of making the contract, may agree that some other and further act shall be done to complete the sale, such as a formal delivery and a bill of sale ; and then the transfer is not complete until such act is done.<sup>2</sup>

Our earlier statutes of registration do expressly make this exception ; but only for a specific and exactly defined purpose ; and by a familiar rule of law this expression should exclude the implication of any further effect. This question, however, has passed under adjudication ; and we have an opinion, cited before, which we regarded as authoritative, that " the registry acts have not, in any degree, changed the common law as to the manner of trans-

<sup>1</sup> *The Sisters*, 5 Rob. Adm. 155 ; *Weston v. Penniman*, 1 Mason, 306.

<sup>2</sup> *Higgins v. Chessman*, 9 Pick. 7.

ferring this species of property.”<sup>1</sup> But there may be such a rule, derived from the known and established *Lex Mercatoria*; and this we may gather from a sufficiently ancient, recognized, and universal custom of merchants. We do not, however, find any evidence of such a custom on this point as would have the force of law.

Undoubtedly, as has been already intimated, the usage of merchants in all nations, the repeated statements of writers of authority, and indeed the nature of the property, lead to the inference that a transfer of a ship by a written instrument of some kind is usual and proper. But further than this we cannot go, because we see no sufficient ground for saying that what may even be called the rule of practice in this behalf has anywhere, by mere usage, the force of law. We doubt whether such intimations as occur in Jacobsen’s Sea Laws,<sup>2</sup>—that the writing is indispensable,—are to be taken as literally and exactly true.

Sometimes this is said to be the rule of the English admiralty. In much the strongest case, however,<sup>3</sup> Lord Stowell goes no further than to say that “a bill of sale is the proper title, to which the maritime courts of all countries would look. It is the universal instrument of transfer of ships, in the usage of all maritime countries; . . . it is what the maritime law expects, what the court of admiralty would, in its ordinary practice, always require.” But the case did not turn on this question; and these remarks are, to a certain extent, *obiter*; and if the whole case be examined it will be seen, we think, that Lord Stowell regarded the general question as an open one. Immediately after the words just quoted, he refers to the English statute of registration, which, as we have seen, requires such instrument in writing in the most positive terms, declaring, indeed, that no transfer without it shall be valid or effectual for any purpose whatsoever, in law or in equity. It cannot, therefore, be surprising to find all the English courts, whether of law or of equity, asserting that any transfer of a ship is incomplete and ineffectual, unless there be a bill of sale.<sup>4</sup>

They have a reason for this in the stringent provision of their

<sup>1</sup> *Weston v. Penniman*, 1 Mason, 306, 317, per Mr. Justice Story.

<sup>2</sup> Book 1, ch. 2, p. 21.

<sup>3</sup> *The Sisters*, 5 Rob. Adm. 155.

<sup>4</sup> See *Ex parte Halkett*, 19 Ves. 474, 475; *Atkinson v. Maling*, 2 T. R. 462, 466; *Sutton v. Buck*, 2 Taunt. 302.

own statute. We have no new reason for it here. And whether the views we have above expressed as to the reason of the difference be accepted or not, it would seem that no court in this country would be justified in supposing that this difference between the American and the British statutes was merely accidental, or in holding that the American statute was intended to express the same thing as the British, when its language is so entirely different.

It is, moreover, to be noticed that the English courts of equity seem disposed to confine the operation of this clause within strict limits. So far as the decisions of this country, out of admiralty, go, we have in the first place very positive declarations of common law courts, that the property in a ship may pass like that of any other chattel, without any instrument in writing. This would seem to settle for us the law on this subject, aside from the statute, or from an admiralty construction or application of them. But we have, in the next place, in 1817, a positive declaration by a court exercising full admiralty powers, that the United States "registry acts have not in any degree changed the common law as to the manner of transferring this species of property."<sup>1</sup>

Here would seem to be a plain assertion that the common-law rule above stated is in admiralty the rule as to shipping. But the very next sentence is, "To be sure, a bill of sale is necessary to pass the title of a ship; but this does not depend upon any enactment peculiar to our municipal law, but grows out of the general maritime law, which requires such a document as the proper muniment of the title of the ship." It might seem that these passages are to be reconciled only by supposing that the court, by the "common law," mean to include the *Lex Mercatoria* or "the general maritime law" as a part of it, and that this requirement of a written instrument thus becomes a part of the common law. But, an examination of the whole case, or even of the whole paragraph in which these passages occur, would show, we think, that this was not the meaning of the court. And if it was, it was certainly an *obiter* opinion, not called for by the facts, nor by the questions raised, nor by the decision, for this distinctly sustains a merely equitable title, resting upon no bill of sale whatever. In one case,<sup>2</sup> the court said: "The difference between the law of Eng-

<sup>1</sup> *Weston v. Penniman*, 1 *Mason*, 306, 317.

<sup>2</sup> *Phillips v. Ledley*, 1 *Wash. C. C.* 226, 229.

land on this point, and the law of the United States, is *striking*."

Thus far, then, we have no case in any American court, in which the rights of any party are made to depend upon this rule, or are distinctly affected by the assertion of it. But it may seem that a case before Mr. Justice Story,<sup>1</sup> goes this length. It involves directly the question of title to a ship. The plaintiff endeavored to maintain a title to one half of a ship by a merely oral transfer; and he was not permitted to do so. *Story, J.*, saying, "I think that a title to a ship cannot pass by parol, when she is sold to a purchaser;" and he quotes with approbation the remarks of Lord Stowell which we have cited above. But when we look at the facts in the case, the force of the language is very much abated. We find that the plaintiff had received a bill of sale of the ship to himself and another; and he undertook to show that the bill of sale was in fact intended to pass the property in the whole ship to him alone. But says *Story*: "The legal title passed to both; and to introduce the parol proof would be to contradict the direct allegations of the deed." This was, of course, made impossible by the most familiar rules of the law of evidence; that is, of the common law, without any reference to the law merchant. The admission of this proof would have materially varied the meaning and effect of a written instrument of title, and that a sealed instrument, by parol evidence. Only to say that this could not be permitted, would have been abundantly sufficient to decide the whole case. So far, therefore, as this case is to be regarded as authority, we must consider the preceding remark of the court as either altogether *obiter*, or as applicable only to facts like those that the court were then considering.

On the whole, therefore, and as a conclusion from all these premises, we should say that there was no case in America in which a purchaser in good faith of a ship, or a part of a ship, was dispossessed of his property by the operation of that rule; or, in

<sup>1</sup> *Ohl v. Eagle Ins. Co.* 4 Mason, 172, 390. In *The Oriole*, 1 Sprague, 31, the court said: "It is contended that a bill of sale is necessary in admiralty to pass property in a ship. The common-law courts of this State have gone far towards holding that the entire property in a vessel may pass without a bill of sale, but courts of admiralty have required it." No opinion, however, was expressed by the court on the point.



other words, because the purchase, or transfer to him, had not been made by means of, or accompanied by, any written instrument. We are confident that no court of common law would ever apply this rule to such a case, and with such an effect, unless so far as they might be constrained by the Statute of 1850. That is, no court of common law would consider a written instrument absolutely indispensable, and an oral transfer without one necessarily void and of no effect whatever. And still less would a court of equity. And as a court of admiralty always possesses and exercises full equity powers, we are of opinion, that in any such case, where the equity or moral justice of the case required it, even a court of admiralty, if it considered a written instrument indispensable, would either require of the seller that he should make such instrument as the law required, or, acting upon a familiar equity principle, would consider that to be done which ought to be done, and assuming that such written instrument had been made, would protect the rights of the purchaser accordingly.<sup>1</sup>

<sup>1</sup> That Lord *Stowell* did not intend to assert as a positive rule, that a *bill of sale* is in all cases indispensable to the transfer of property in a ship, and that he considered it a question open to argument, appears to be the import of his concluding words in the case of *The Sisters*, 5 Rob. Adm. 155, 160. "Whilst Charnock was left in possession of the bill of sale, such a delivery as is here said to have taken place could not be a delivery of the title to the property. It was merely putting the property into the hands of another, for the purpose of executing a particular contract, but which contract was in fact never executed. Nothing less than an express declaration, made by Charnock to Tubbs, 'I deliver this to you for the use of Marsden,' could fairly raise the argument, how far delivery, coupled with the correspondence, could be held equivalent to a bill of sale." But see *The Helena*, 4 Rob. Adm. 3.

That, independently of the registry acts, no bill of sale was necessary to transfer the property in a British vessel, would seem to follow from those cases which have determined that, where these acts do not apply, the ownership may be, at least *prima facie*, established by evidence of possession under claim of title, or other matter *in pais*, as in the case of any other chattel. *Robertson v. French*, 4 East, 130; *Thomas v. Foyle*, 5 Esp. 88; *Pirie v. Anderson*, 4 Taunt. 652; *The Nostra Signora de los Dolores*, 1 Dods. 290. See also *Bas v. Steele*, 3 Wash. C. C. 381; *United States v. Amedy*, 11 Wheat. 392, 409; *Hozey v. Buchanan*, 16 Pet. 215.

Under the American registry acts it is well settled, that a parol sale of a ship with delivery is good to pass the title from the vendor to the vendee, although the privileges of an American bottom are thereby forfeited. *Wendover v. Hogeboom*, Anthon's N. P. 121, 7 Johns. 308; *Taggard v. Loring*, 16 Mass. 336, 340; *Lamb v. Durant*, 12 Mass. 54; *Bixby v. Franklin Ins. Co.* 8 Pick. 86; *Weaver v. The*

## SECTION II.

## OF THE TRANSFER OF A SHIP BY BILL OF SALE.

In England, the first bill of sale, by which the property in the vessel passes from the builder to the first purchaser or owner, is

S. G. Owens, 1 Wallace, Jun. 349; Fontaine v. Beers, 19 Ala. 722; Leonard v. Huntington, 15 Johns. 298; Badger v. Bank of Cumberland, 26 Maine, 428; Vinal v. Burrill, 16 Pick. 401; Barnes v. Taylor, 31 Maine, 329; Mitchell v. Taylor, 32 Maine, 434; Welsh v. Parish, 1 Hill (S. C.), 155; The Amelie, 6 Wallace, 18.

Nor is the national character, *ipso facto*, gone by such a transfer, but the registry act makes the production of a bill of sale requisite to entitle the ship to be registered anew, and the want of such new registry forfeits the national character. If, therefore, a bill of sale is executed at any time before application made for a new registry, it is sufficient. United States v. Willings, 4 Cranch, 48; Hatch v. Smith, 5 Mass. 42, 53.

The effect of the forfeiture is not that the ship acquires the character of an alien ship for all purposes, but that she loses the privileges of an American vessel. Fontaine v. Beers, *supra*.

The difference in the result of a non-compliance with the terms of the registry acts in the two countries has been well established in the case of other provisions common to the acts, and classed with them and enforced by the same penalties as the requirement of an instrument in writing, thus affording a strong presumption, independent of direct authority, that this diversity extends to the clause requiring such instrument.

Thus the same section requires that the bill of sale shall "recite the certificate of registry." And the omission of this recital has been adjudged in Great Britain to invalidate the sale, so that the vendee who had taken possession of the vessel under the bill of sale could not retain her against the assignees of the vendor, who subsequently to the sale had become a bankrupt. Rolleston v. Hibbert, 3 T. R. 406. And relief was denied in equity. Hibbert v. Rolleston, 3 Brown's Ch. 571. See also Campbell v. Thompson, 2 Hare, 140. The case is the same with an executory agreement to sell. Biddell v. Leeder, 1 B. & C. 327; Brewster v. Clarke, 2 Meriv. 75; Hughes v. Morris, 2 De G., M., & G. 349, 12 Eng. L. & Eq. 291. So where a certificate was misrecited. Westerdell v. Dale, 7 T. R. 306. These provisions of the registry acts do not, however, extend to transfers by operation of law. Curtis v. Perry, 6 Ves. 739 a; *Ex parte* Yallop, 15 Ves. 60, 68; Bloxam v. Hubbard, 5 East, 407.

In America such an omission merely forfeits the national character of the vessel. Mitchell v. Taylor, 32 Maine, 434; D'Wolf v. Harris, 4 Mason, 515, 533; Wooley v. Comtant, 4 Johns. 54. So with the insufficient recital of the certificate. Philips v. Ledley, 1 Wash. C. C. 226, 229. So with the omission to enroll

called the grand bill of sale, and is distinguished by this name from the bills of sale by which subsequent transfers are made.<sup>1</sup> But we have no such distinction in this country.<sup>2</sup> Whether any bill of sale is essential to a transfer, we have already considered. If any be necessary, — and that a transfer of a ship by a written instrument is customary and proper we have already said, and no one has ever doubted, — there is no form for one prescribed by law, or by any usage so established as to have the force of law.<sup>3</sup>

If a ship be mortgaged, we know no reason why it does not come under the common law, or statute law where that exists, in relation to mortgages of personal property, unless the Statute of 1850, ch. 27, interferes with and controls the State statutes. For most of our States have now statutes requiring, to make a mortgage of personal property valid, either a transfer of possession, or a record of the mortgages; and they prescribe a place for the record. But the statute of 1850 requires that every transfer, including, of course, mortgages, should be registered in the custom-house.<sup>4</sup> The questions then occur, is the registry of the transfer in the custom-house sufficient, so that registry under the State statutes is unnecessary; or, secondly, is registry in the custom-house indispensable, or is it enough that the transfer is recorded under the State statutes.<sup>5</sup> Waiving the question of the constitu-

the bill of sale in the custom-house. *Hozey v. Buchanan*, 16 Pet. 215. See also, as to the distinction between the British and American registry acts, with respect to the consequence of a neglect to comply with their provisions generally. *Colson v. Bonzey*, 6 Greenl. 474, 475.

<sup>1</sup> Abbott on Shipping, 3. In England, the grand bill of sale is necessary to the transfer of a ship at sea. *Atkinson v. Maling*, 2 T. R. 462; *Gordon v. East India Co.* 7 T. R. 228, 234.

<sup>2</sup> *Portland Bank v. Stacey*, 4 Mass. 661; *Wheeler v. Sumner*, 4 Mason, 183; *Morgan v. Biddle*, 1 Yeates, 3; 3 Kent, Com. 133.

<sup>3</sup> See the remarks of *Parke, B.*, on the stat. 3 & 4 Will. 4, c. 55, § 31, in *Hunter v. Parker*, 7 M. & W. 322, 343. See also *Fox v. The Lodemia*, Crabbe, 271.

<sup>4</sup> To entitle "a bill of sale, mortgage, hypothecation, conveyance, or discharge of mortgage, or other incumbrance of any vessel" to be recorded, it must be "duly acknowledged before a notary public or other officer authorized to take acknowledgments of deeds." Acts of 1865, c. 101, 13 U. S. Stats. at Large, 519.

<sup>5</sup> In *Thompson v. Van Vechten*, 5 Abbott, Pr. 458, it was held, that the act of 1850 did not abolish or supersede the State statute of New York relating to the recording of mortgages. Reports of this case at subsequent stages, but not on this point, may be found in 6 Bosw. 373, 27 N. Y. 568. The same point was

tionality of the Statute of 1850, which we have already considered, we are of opinion that the United States statute controls the State statute, so far, that record under this latter would have no effect as legal notice of the transfer. At least, if it be constitutional, we do not see how its requirements can be superseded or supplied by those of a State law.<sup>1</sup> But the statute of 1850 only applies, it has been held, to vessels which are registered, licensed, or enrolled, and a mortgage of a vessel which comes under none of these heads need not be recorded at the custom-house, but may be recorded according to the provisions of the statute of the State where she

decided in *Horton v. Davis*, 26 N. Y. 495. And in *Ætna Ins. Co. v. Aldrich*, 26 N. Y. 92, the same principle was applied to a law of the State of Illinois. The object of the law was interpreted by *Wright, J.*, as follows: "It seems to me that it was passed to apply between the government and the owners of a certain class of vessels; that its purpose was to secure a complete record in the office of the collector of the customs, of the title to enrolled and registered vessels; and its object was not to regulate and control the transfer of property in vessels generally, but to provide a custom-house regulation which would better protect the government against violations of its revenue system, and enable its officers to enforce the rules relating to the national commerce."

<sup>1</sup> It is well settled that a law of Congress, which is in accordance with the constitution, is the supreme law of the land, and that a State law which comes in conflict with it must cease to operate, so far as it is repugnant to the law of the United States. *Sinnot v. Davenport*, 22 How. 227; *License Cases*, 5 How. 504, 574; *Fox v. State of Ohio*, 5 How. 410; *United States v. Marigold*, 9 How. 560; *Moore v. State of Illinois*, 14 How. 13; *Groves v. Slaughter*, 15 Pet. 449; *Passenger Cases*, 7 How. 283; *Nathan v. State of Louisiana*, 8 How. 73; *United States v. Peters*, 5 Cranch, 115; *Mager v. Grima*, 8 How. 490; *Weston v. City Council of Charleston*, 2 Pet. 449; *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of United States*, 9 Wheat. 738; *Prigg v. Commonwealth of Penn.* 16 Pet. 539; *Ogden v. Saunders*, 12 Wheat. 419; *Brown v. State of Maryland*, 12 Wheat. 419; *Norris v. City of Boston*, 4 Met. 282, 288; *People v. Brooks*, 4 Den. 469. See also *Port Wardens of N. Y. v. Cartwright*, 4 Sandf. 236, opinion of *Paine, J.* It is provided by statute in New York, that a steamboat navigating the waters of that State at night shall carry two lights. It is also provided by an act of Congress that steamers shall carry one or more lights. In *Fitch v. Livingston*, 4 Sandf. 492, a steam propeller, licensed as a coaster, going up the Hudson on a voyage from Philadelphia to Albany, came into collision with another steamer, and was found by the jury to be in fault because she carried only one light. It was argued, that, having complied with the provisions of the United States statute, she had done all that was necessary, but the court held that she was bound to comply with the statute of the State through whose waters she was passing. See, however, *The Steamboat New York v. Rea*, 18 How. 223.

belongs.<sup>1</sup> So, a canal boat is not a vessel within the meaning of this statute.<sup>2</sup> An important question arises under this act, viz. where conveyances should be recorded. It has been held by the Supreme Court of Massachusetts that the custom-house where the vessel was last registered is the proper place.<sup>3</sup> Mr. Justice *Clifford*, on the other hand, in a well-reasoned opinion holds that conveyances must be recorded at the home port of the vessel.<sup>4</sup> The act does not apply to charter parties,<sup>5</sup> nor to the lien of a material man for supplies.<sup>6</sup>

The act in question provides that no bill of sale, &c., "shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof," unless such bill of sale is recorded. It is familiar law under registry acts relating to real estate, that if a subsequent purchaser has knowledge of a prior unrecorded deed he is bound by it.<sup>7</sup> There are two kinds of notice, direct or actual, and constructive. This act it will be noticed by implication excludes the latter, hence it is not enough to show that the subsequent purchaser had knowledge of circumstances calculated to lead to inquiry, if with the inquiry made the facts do not convey actual notice of the bill of sale.<sup>8</sup>

<sup>1</sup> *Veazie v. Somerby*, 5 Allen, 280. The Massachusetts Rev. Stats. of 1836 ch. 74, contained provisions relative to mortgages of personal property. The U. S. statute was passed in 1850, and in 1851 an act was passed by the Legislature of Massachusetts declaring that it should not be necessary to the validity of any mortgage or transfer "of any ship or vessel" that it should be recorded by any city or town clerk. Stat. 1851, c. 57. It was held, that this statute had reference to the U. S. Stat. of 1850, and that it did not apply to vessels which were not registered, licensed, or enrolled. *Veazie v. Somerby*, *supra*.

<sup>2</sup> *Hicks v. Williams*, 17 Barb. 523.

<sup>3</sup> *Potter v. Irish*, 10 Gray, 416.

<sup>4</sup> *The Martha Washington*, U. S. C. C. Maine, 25 Law Reporter, 22.

<sup>5</sup> *Hill v. The Golden Gate*, 1 Newb. Adm. 308.

<sup>6</sup> *The Brig Minnie*, U. S. D. C. South Carolina, 6 Am. Law Register, 328.

<sup>7</sup> 1 Story, Eq. Jur. § 397; 4 Greenl. Cruise, 452. So held also under a State Law of South Carolina, relating to the registry of conveyances of vessels. *Cape Fear Steamboat Co. v. Conner*, 3 Rich. 335.

<sup>8</sup> *The Parker Mills v. Jacot*, 8 Bosw. 161. In *Pomeroy v. Stevens*, 11 Met. 244, 247, under a statute containing the words "actual notice," *Wilde, J.* said: "Since this provision, no implied or constructive notice of an unregistered deed will give it validity against a subsequent purchaser or attaching creditor. It is not sufficient to prove facts that would reasonably put him on inquiry. He is not bound to inquire; but the party relying on an unregistered deed, against a subsequent

If the ship be abroad, by the statute of Massachusetts the record is not necessary, if the mortgagee takes possession as soon as possible after her return to that State;<sup>1</sup> and this would seem to be almost an inference of law, even without express provision. For if the ship be where possession cannot be taken, and possession is taken as soon as that is possible, it would hardly seem to come within the meaning or within the reason of a mortgage without possession.<sup>2</sup> Hence we should say that this principle would apply to a mortgage of goods at sea; for, in general, all the principles which apply to the sale of the ship at sea, apply to the sale of her cargo.<sup>3</sup> The question whether the sale of a vessel was fraudulent as against creditors, it has been held cannot be raised by third persons who have no interest in the question.<sup>4</sup>

### SECTION III.

#### OF THE SALE OF A SHIP BY THE BUILDER.

The builder of a ship is its first owner. It is true, that a party might contract with a builder to perform all the labor upon materials which that party would supply, and then the ship would belong to him for whom it is built, from the beginning, and would never be the builder's. But this is never done in practice. The ship-builder constructs the vessel either upon an order, or a contract for building or sale, or to sell it to any purchaser who may offer, or to own it himself. But it is possible that the contract for building and sale may be such as to make the ship become the property of the future owner, by instalments, paid in the course of the building. The cases are not quite clear on this subject; there is in

purchaser or attaching creditor, must prove that the latter had actual notice or knowledge of such deed." See *Calais Steamboat Co. v. Scudder*, 2 Black, 372.

<sup>1</sup> Rev. Stats. 1836, ch. 74, § 6; Gen. Stats. 1860, ch. 151, § 2.

<sup>2</sup> This question of possession will be more fully considered in a subsequent section.

<sup>3</sup> *Gardner v. Howland*, 2 Pick. 599, 602; *Pratt v. Parkman*, 24 Pick. 42; *Gallop v. Newman*, 7 Pick. 282; *D'Wolf v. Harris*, 4 Mason, 515; *Conard v. Atlantic Ins. Co.* 1 Pet. 389, 449.

<sup>4</sup> *The Sch. Lion*, 1 Sprague, 40.

them some reference to provisions in the English statutes as to builder's certificates, etc., which do not exist in our own; but on general principles we should say, that, where the owner is to pay for her by instalments, if the instalments are merely on time, without reference to the state of forwardness of the ship, the property remains in the builder until the ship is finished and delivered; and if she be lost or destroyed in the mean time, it is the builder's loss, and he is still bound to build, finish, and deliver a ship at the appointed time. But if the instalments, although on time, are graduated, expressly or impliedly, upon the condition of the ship, and are intended to pay the builder for work and labor and materials to the time of payment, and to purchase the fabric as it then existed, each payment is in full for a purchase of the ship at the time it is made, and has the effect of passing the property absolutely to the vendee, subject only to the lien of the builder for the purpose of finishing the ship.

It will be seen in the note below, that the cases on this subject are quite irreconcilable. We think, however, the law must be this: A may sell his lumber, out of which a ship is to be made, to B, and B may buy it, whenever they please, and wherever the lumber may be. And if, from all the facts, it is plain that it was the intention of the parties that one should sell and the other buy the fabric before it was completed, there is nothing in the law to prohibit or avoid the bargain. But such a bargain is not proved by the mere fact of instalments, however graduated, nor by the employment by the payer of a superintendent (on which fact great stress is laid in some of the cases), although these facts may go far towards identifying the structure, and sustaining an action for a breach of the contract in not finishing or not selling that very ship; and they may have an important bearing on the amount of damages. But they may, nevertheless, be insufficient to prove an actual sale and transfer of the property.<sup>1</sup> The effect of the decis-

<sup>1</sup> The general principle, that a sale cannot be executory, and that there can be no sale of a thing not in existence at the time, but merely a contract to sell, which passes no property in the object itself until it is finished and delivered, but gives a mere personal right of action, applies to a ship as to any other chattel, although payment be made in advance. *Mucklow v. Mangles*, 1 Taunt. 318.

In *Woods v. Russell*, 5 B. & Ald. 942, the circumstances of the case were somewhat peculiar. "This ship," said *Abbott*, C. J., in delivering the opinion of the court, "is built upon a special contract, and it is part of the terms of the contract

ions seems to be, that the time when the property passes in a vessel on a contract for building, is a question of intent, to be gathered from

that given portions of the price shall be paid according to the progress of the work ; part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that, as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other." Although the case itself was decided on a different ground, namely, that the builder having signed his certificate to enable the purchaser to have the ship registered in his own name, the property vested in the latter from the time of the registry, the authority of this dictum was recognized in *Battersby v. Gale*, cited 4 A. & E. 458, and in *Atkinson v. Bell*, 8 B. & C. 277, 282, by *Bayley, J.*, who in alluding to *Woods v. Russell*, said : "As by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price, the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific articles of which the ship was made." And also, though with considerable doubt and hesitation, in *Clarke v. Spence*, 4 A. & E. 448, where the court seem to have rested their acquiescence in the doctrine of *Abbott, C. J.*, more upon the ground of precedent and expediency than principle. The case itself was similar to *Woods v. Russell*, with the omission of the registration, and the additional fact that an agent was employed by the purchaser to superintend the building and approve the materials employed. Whence "it follows," said *Williams, J.*, "that, as soon as any materials have been approved by the superintendent, and used in the progress of the work, the fabric consisting of such materials is appropriated to the purchaser, otherwise the superintendent might be called upon, when one vessel had been nearly constructed, to begin his work *de novo*, and superintend the building of a second ; and, in this point of view, the appointment of a superintendent by the contract appears to be of considerable importance."

In *Moody v. Brown*, 34 Maine, 107, there is a dictum, which admits that where payment is to be made by instalments the property will pass. In New York, however, a different rule of law is laid down, and it is there held that in such a case the property will not pass until the vessel is completed and delivered. *Merritt v. Johnson*, 7 Johns. 473. See also *Johnson v. Hunt*, 11 Wend. 135. It was so held also in a case where, in addition to the price being paid by instalments, a person was appointed by the vendee to superintend the work, though the court admitted that in such a case the builder would be bound to deliver the identical vessel. *Andrews v. Durant*, 1 Kern. 35. See, to the same effect, *Haney v. Schooner Rosabelle*, 20 Wisc. 247. In Scotland, the law as it is in England was settled by a very early case. *Smith v. Duncanson*, decided in 1786, *Bell on Sales* (1844), p. 17. But where payment is to be made in a specific manner, without reference to the progress of the work, the property will not pass. *Laidler v. Burlinson*, 2 M. & W. 602. In the late case of *Wood v. Bell*, 5 Ellis & B. 772, 34 Eng. L. & Eq. 178, the vessel was to be paid for by instalments, the first four on certain days named, and unconditionally ; with no express reference



all the circumstances of the case. Although a contract to build a ship is inoperative to pass the property therein, yet a conveyance of the keel after it has been laid vests the property in that in the vendee, and draws after it all subsequent additions, according to the maxim of the civil law, "*proprietæ navis, carinæ causam sequitur.*"<sup>1</sup> An agreement to pledge a vessel then building to cover certain advances, and that the pledgee may purchase her at a certain rate, is to the stage in her building to which she might be advanced on the arrival of those days, and it was not apparent that the sums specified for each payment were to be commensurate with her probable progress on the days named. The next three instalments were also made payable on days certain; but the first two of these payments were made to depend on her having been carried on to certain specific stages in her building on those days respectively. The payment of the third depended on her being, on the day named, built according to contract. The next circumstance was, that the vessel was to be built under the direction of a person appointed by the future purchaser. It also appeared in evidence that the builder, at the instance of the plaintiff, punched his name on the keel, for the express purpose of securing the vessel to the plaintiff, and, although he refused after this to execute a formal assignment to the plaintiff, yet at the same time he admitted her to be the plaintiff's property. It was held that whether the property passed, was to be shown by the intention of the parties, as gathered from all the circumstances of the case. In regard to the payment by instalments, no decided opinion was expressed. As to the appointment of a person to superintend the work, the following language is used: "It certainly could not be contemplated that he was to superintend the building of more than one vessel under this contract, or that he was to superintend the building of any vessel which Joyce could, at his pleasure, transfer to another person. Still, it must be admitted, that this is by no means conclusive as to the question of property; it may be that it would have been a breach of contract not to deliver the specific vessel to the plaintiff as soon as she was completed, and yet the property, until she was completed, might have remained in Joyce." But it was held, that, however ambiguous these circumstances might be, still the punching of the name, and the declaration of the builder, were conclusive to show that it was the intention of the parties that the vessel should pass to the plaintiff. Affirmed in the Exchequer Chamber, 6 Ellis & B. 355, 36 Eng. L. & Eq. 148. In *Baker v. Gray*, 17 C. B. 462, 34 Eng. L. & Eq. 387, payments were to be made by instalments from time to time, and it was stipulated that if the vessel was not finished within a certain time the vendee might enter and take possession of her, and that the property in her should be deemed, from the payment of the first instalment, to be in the vendee. It may, therefore, be considered as doubtful whether the mere fact of payment being made by instalments, although commensurate with the progress of the vessel, is of itself proof that the parties intended the property to pass, and a contract similar to the one in *Baker v. Gray* has at least simplicity and safety to recommend it.

<sup>1</sup> *Glover v. Austin*, 6 Pick. 209. See also *Sumner v. Hamlet*, 12 Pick. 76, 82.

neither a sale nor a mortgage nor pledge, and transfers no property in the vessel, although the advances are made.<sup>1</sup> Where the property does pass before the completion of the ship, the builder has a common-law lien, or right of possession to finish her and earn the full price.<sup>2</sup>

The builder transfers the ship to the first purchaser by the original bill of sale, which is called in England the grand bill of sale, to distinguish it from the bills of sale made on subsequent transfers of the ship. But, as we have already remarked, this distinction does not exist, or not for any practical purpose, in this country.<sup>3</sup>

The builder should deliver to the first owner his certificate, that the owner may give it to the collector, as required by the statute of registration.<sup>4</sup>

<sup>1</sup> *Bonsey v. Amee*, 8 Pick. 236. But in *Reid v. Fairbanks*, 13 C. B. 692, 24 Eng. L. & Eq. 220, where, under an agreement to build a ship, the defendant, to secure the plaintiffs, as well for the advances they had previously made to him as for those which they should be called upon to make to complete the vessel, made them a bill of sale thereof, which stated that he transferred to them a certain ship in progress of building (describing it), and also six hundred tons of timber to finish the vessel, "to have and to hold the said ship or vessel, etc., to the said J. Reid, when the said ship or vessel shall be complete and finished, in as full, ample, and perfect a manner as if the said ship or vessel were ready for sea, and ready to be delivered to the said J. Reid at the time of executing these presents," it was held by the court that the property passed to the plaintiffs by the bill of sale, and that the *habendum* had not the effect of postponing the vesting thereof to the time when the ship should be completed. *Jervis*, C. J. said: "There is no doubt the whole question is one of construction of contract. There may be cases in which such a contract would have the effect of transferring the property only at a future period, or it may have the effect of transferring the property at once; but it seems to me that here it was intended to pass the property at once, because the object of the instrument was to give the plaintiffs security for advances. It has been contended that it is no security, but merely a contract between the parties; but it professes to be a security, and it cannot be so unless it operate as a present sale, and it does not signify what happens afterwards. It is, therefore, unimportant to consider the effect of the registration of the vessel. I think it very likely that if there had been no bill of sale there would still have been enough to bind the property in the ship. But it is unnecessary to consider that part of the case."

<sup>2</sup> *Woods v. Russell*, *supra*.

<sup>3</sup> See *ante*, p. 60, note 2.

<sup>4</sup> Act of 1792, c. 1, § 8, 1 U. S. Stats. at Large, 291. As to the effect of the transfer of the builder's certificate to the purchaser under the English Registry Acts, see *Woods v. Russell*, 5 B. & Ald. 942.

## SECTION IV.

## OF THE SALE OF A SHIP BY THE MASTER.

A sale of a ship is frequently made by the master; and if this is justified by necessity, it is valid.<sup>1</sup> The necessity must, however, be imminent and extreme; and the master must have acted in good faith, and with the exercise of a sound discretion. It is not quite easy to determine by exact definition what the power of the master is in this respect. It is certainly not enough that he acted in good faith, if the necessity were not so cogent as to give him the authority.<sup>2</sup> It is sometimes said also, that it is not enough

<sup>1</sup> It is expressly declared by several foreign ordinances, that the master shall not sell the ship without especial authority for that purpose from the owners. He was, however, authorized to borrow money upon the credit of the ship, with the consent of his crew. Consulat, par Boucher, c. 156; Laws of Oleron, art. 1; Laws of Wisbuy, art. 13; Laws of the Hanse Towns, art. 57; French Ord. liv. 2, tit. 1.

It seems probable from the early case of *Tremenhere v. Tresillain*, Sid. 452, that the power of the master to sell his ship under any circumstances whatever, without instructions from the owners, was not originally recognized in England, although there is a case in *Jenkin's Centuries*, p. 165, which might countenance a different doctrine. It is there observed, that in case of famine a master may sell his ship, although it does not belong to him. Lord *Raymond*, in *Johnson v. Shippen*, 2 Ld. Raym. 982, considered a bill of sale given by the master void as such, but valid as a hypothecation of the vessel, upon which process *in rem* might issue in admiralty, although not *in personam*. The passage in *Eakins v. East India Co.*, 1 P. Wms. 395, 2 Bro. Parl. Cas. 382, cannot be considered, as we apprehend, an authority one way or the other; for, although it is there stated that the captain had no power to sell the ship, it is also expressly found that there existed no necessity for a sale. It is now well settled by a series of decisions, that the master, in a case of necessity, has the power to sell. See cases *infra*. And Dr. *Lushington*, in the case of *The Catharine*, 1 Eng. L. & Eq. 679, 681, says: "In later days I think a wiser view of the question has been taken, because I take the law now to be, that, when an urgent necessity exists, which the master cannot meet, it is competent to him to sell the vessel." But in such a case, the burden of proof lies on the purchaser to show that the sale was necessary. *The Glasgow, Swabey*, Adm. 145.

<sup>2</sup> *The Fanny & Elmira*, Edw. Adm. 117; *Hunter v. Parker*, 7 M. & W. 322; *Cannan v. Meaburn*, 1 Bing. 243; *Meaburn v. Leckie*, 4 Dow. & R. 207 n.; *Idle v. Royal Exch. Ass. Co.* 8 Taunt. 755; *Tanner v. Bennett*, Ryan & M. 182; *Hayman v. Molton*, 5 Esp. 65; *Robertson v. Clarke*, 1 Bing. 445. The law is stated

that he sells in the exercise of a sound discretion, because the danger must be actual. But it is quite certain that the validity of

with great accuracy by *Tindal, C. J.*, in *Somes v. Sugrue*, 4 C. & P. 276: "A great deal has been said about the word *necessity*. Undoubtedly, it is not to be confined to, or so strictly taken, as it is in its ordinary acceptation. There can, in such a case, be neither a legal necessity nor a physical necessity, and therefore it must mean a *moral necessity*; and the question will be, whether the circumstances were such, that a person of prudent and sound mind could have a doubt as to the course he ought to pursue. The points principally for consideration will be, the expenditure necessary to put the ship into a condition to bring home her cargo; the means of performing the repairs, and the comparison between those two things and the subject-matter which was at stake; and it must not be a mere measuring cast, not a matter of doubt in the mind, whether the expense would or would not have exceeded the value; but it must be so preponderating an excess of expense that no reasonable man could doubt as to the propriety of selling under the circumstances, instead of repairing. . . . A captain has no power to sell, except from necessity, considered as an impulse, acting morally, to excuse his departure from the original duty cast upon him of navigating and bringing back the vessel. If he has no means of getting the repairs done in the place where the injury occurs; or if, being in a place where they might be done, he has no money in his possession, and is not able to raise any, then he is justified in selling, as the best thing that can be done." And in this country the same rule exists; the sale must not only be *bonâ fide* but the necessity for it must exist. *Pope v. Nickerson*, 3 Story, 465, 504; *Robinson v. Commonwealth Ins. Co.* 3 Sumn. 220; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604; *The Brig Sarah Ann*, 2 Sumn. 206, s. c. *New Eng. Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387; *The Sch. Tilton*, 5 Mason, 465.

The necessity which will justify the sale is termed by *Shaw, C. J.*, an "imperious, uncontrollable necessity." *Peirce v. Ocean Ins. Co.*, 18 Pick. 83, 88. In *Somes v. Sugrue*, *supra*, and in *Pope v. Nickerson*, 3 Story, 465, 504, it is called a moral necessity. Mr. Justice Story, in the case of *The Ship Fortitude*, 3 Sumn. 228, 248, thus defines the meaning of *moral necessity*: "Some criticism has been employed upon the words 'moral necessity' as applied to the conduct of the master acting in cases of this sort; and it has been more than intimated, that the expression is quite new, and can scarcely be traced beyond the case of *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 249. It does not appear to me that the criticism has any just foundation, or that the expression is either new or inapt. It seems to indicate precisely that which such a case requires. Moral necessity arises, where there is a duty incumbent upon a rational being to perform, which he ought at the time to perform. It presupposes a power of volition and action, under circumstances in which he ought to act, but in which he is not absolutely compelled to act by overwhelming, superior force." See also *The Amelie*, 6 Wallace, 18; *The Lucinda Snow*, Abbott, Adm. 305; *The Segredo*, Spinks, Adm. 36. In *Hall v. Franklin Ins. Co.* 9 Pick. 466, it is said: "The sale should be indispensably requisite. The reasons for it should be cogent. We mean a

the sale is not to be judged of only by the event; for that may show that an unusual tide, or some other favorable circumstance, which could not have been rationally expected, had lifted her off.<sup>1</sup>

necessity which leaves no alternative; which prescribes the law for itself, and puts the party in a positive state of compulsion to act." The master may sell where the ship is a total wreck. *Cambridge v. Anderton*, 2 B. & C. 693; *Ireland v. Thompson*, 4 C. B. 149. Or, in an insurance case, if the expense of repairs would exceed the value of the vessel when repaired. *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 249. See also, on this point, the remarks of Mr. Justice *Bayley*, in *Gardner v. Salvador*, 1 Moody & R. 116. "If the situation of the ship be such, that, by no means within the master's reach, it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it, with a fair hope of restoring it to the character of a ship, he cannot, by selling, turn it into a total loss." The master's opinion of the necessity, and the benefit resulting from the sale, and his professional skill, will not justify him in the absence of a real necessity. *Patapeco Ins. Co. v. Southgate*, *supra*; *The Henry*, 1 Blatchf. & H. Adm. 465. The presumption, however, is that he has done his duty. *Robinson v. Com. Ins. Co.* 3 Sumn. 220. In *Post v. Jones*, 19 How. 150, the vessel was wrecked on the coast of Behring's Straits. The cargo, consisting of barrels of oil, was taken out and saved by three other whaling ships. The form of an auction was gone through with, the captains of the three vessels being the bidders, and the ship and tackle were sold for five dollars, and the cargo, part at a dollar, and the rest at 75 cents per barrel. The sale was held invalid. The court said: "All the cases assume the fact of a sale in a civilized country, where men have money, where there is market and competition. They have no application to wreck in a distant ocean, where the property is derelict, or about to become so, and the person, who has it in his power to save the crew and save the cargo, prefers to drive a bargain with the master. The necessity in such a case may be imperative, because it is the price of safety, but it is not of that character which permits the master to exercise this power." See *Butler v. Murray*, 30 N. Y. 88; *The Amelie*, 6 Wallace, 18.

<sup>1</sup> *The Brig Sarah Ann*, 2 Sumn. 206, 215; affirmed on appeal, *New Eng. Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387. Mr. Justice *Wayne*, delivering the opinion of the court in this case, said: "Nor can the necessity for a sale be denied, when the peril, in the opinion of those capable of forming a judgment, makes a loss probable, though the vessel may in a short time afterwards be got off and put afloat. It is true, the opinion or judgment of competent persons may be falsified by the event, and that their judgment may be shown to have been erroneous by the better knowledge of other persons, showing it was probable that the vessel could have been extricated from her peril without great injury or incurring great expense, and the master's incompetency to form a judgment or to act with a proper discretion in the case may be shown. But from the mere fact of the vessel having been extricated from her peril, no presumption can be raised of the master's incompetency, or of that of his advisers." See also *Idle v. Royal Ex. Ass. Co.* 8 Taunt. 755; *Fontaine v. Phoenix Ins. Co.* 11 Johns. 293; *Hall v.*

If, however, we understand by actual danger the actual probability of destruction, as far as that could then be measured or estimated, then, it is true that the authority of the master to sell springs only from a necessity which is caused by actual danger; for danger is one thing, and destruction another; from danger there may be escape, and this may even be swift and easy, and yet the danger have been real and great.

The rule must be, that, if the circumstances were such that if any master of ordinary skill and intelligence, carefully observing all the facts, and weighing all probabilities, would be led to the conclusion that an escape from destruction was but little more than possible, and that a delay sufficient to acquaint his owners with his condition and receive their instructions would in all probability cause a greater loss, he may then sell.<sup>1</sup>

We may be guided, in applying this rule to any case, by inquiring what any owner of common character and intelligence would have done if present; not always what that identical owner would have done, because a peculiarity of temperament might make him hope too long or despair too soon. The ship must not, we repeat, be sold on a mere expediency; or because that may turn out to be the best course. But if it is quite certain that any owner of common understanding and acquaintance with ships and navigation, being on the spot and conversant of all the facts, would conclude that the only thing left for a prudent man to do was to sell the ship at once, then the master may sell.<sup>2</sup>

Franklin Ins. Co. 9 Pick. 466, 484; *The Henry*, 1 Blatchf. & H. Adm. 465; *The Segredo*, Spinks, Adm. 53.

<sup>1</sup> See *post*, p. 73, n. 3, and p. 74, n. 1.

<sup>2</sup> Where the master sells the ship, and the question of the validity of the sale is disputed by the former owner, so that the only question is between him and the vendee, it is clear that the sale will be deemed valid, if the circumstances attending it were such that a jury would be warranted in finding that a prudent owner would have done as the master did. *Hayman v. Molton*, 5 Esp. 65. But we are not disposed to carry the doctrine of "prudent uninsured owner" further than this. And in a case of insurance, we should say, that, in judging of the necessity of the sale, what a prudent owner uninsured would have done, if present, should not be considered. We are aware that this is said to be a test, in numerous cases; but to show the fallacy of it, let us take the case of 'memorandum articles,' where the rule is that if the goods arrive in specie there is no total loss. Now, probably in every case, the best thing that can be done is to sell the goods; but it is certain that this will not be taken as a criterion.

Whether the mere want of funds can be of itself a sufficient necessity to justify a sale by a master has been much disputed. We should strongly incline to the conclusion, that a master can have no power *from necessity* to sell a ship that is not a wreck; but we must admit that the language of the courts in some cases would oppose this conclusion.<sup>1</sup> It is true that the master may have no funds with him, and that his owners may not be known, or their pecuniary responsibility ascertained at the place where his ship needs repair; but there cannot often be a place where extensive repairs could be made, and yet no money be raised on bottomry of the ship, without fraud or neglect somewhere. To meet this very emergency, the law and custom of bottomry are universal. If the requisite repairs would cost so much that the ship, when repaired, would not suffice as security for the sum, then the greatness of the injury, as measured by this cost, might be equivalent to a wreck, and on this ground justify a sale. If the injury be less, so that a comparatively small sum would repair her, but that cannot be

<sup>1</sup> See *Ruckman v. Merchants' Ins. Co.* 5 Duer, 342; *Thomas, J.*, in *Allen v. Commercial Ins. Co.* 1 Gray, 154, 158; *Williams v. Smith*, 2 Caines, 13. As between the underwriters and the owner of the vessel, a sale by the master at a port of destination is not justifiable, for the owner is obliged to furnish funds at such a port. In *American Ins. Co. v. Ogden*, 15 Wend. 532, the master of the ship, on her arrival in a damaged condition at the port of destination, finding himself without funds and without credit, and being unable to raise money for the purpose of repairs, either by bottomry or otherwise, sold the vessel, although the loss was neither actually nor technically a total one. This was held by a majority of the court (*Bronson, J.*, dissenting), to justify an abandonment by the owners. The decision was reversed in the Court of Errors, 20 Wend. 287, on the ground that the want of funds was owing to the default of the owner, who could not make a loss arising from his own fraud or neglect the means of charging the insurers, but the conduct of the master in selling was declared to be entirely justifiable, p. 306, 319. See also *Allen v. Commercial Ins. Co.* 1 Gray, 154. And even in a port of necessity, the master is not authorized to sell the vessel for want of means to repair her, if such means can be obtained by the exercise of proper diligence, either on the credit of the owner, or by pledging as security a part or the whole of the interest under his charge. And the diligence and efforts of the master are not to be limited, in all cases, to the port in which the vessel has found a refuge. *Ruckman v. Merchants' Ins. Co. supra*. As between the owner and master, the master may be justified in selling, when the sale would not be considered valid as between the owner and a third party. Thus if the sale was owing to the neglect of the owner in furnishing funds to repair at a port of destination, a sale would be valid as between the owner and the master, but not, as between the owner and a third party.

raised, then it is a question whether the master should sell at once, or delay the sale until orders can be received from the owners. And, although there may be peculiar cases and emergencies, which must be judged of by themselves, as a general rule we should have no hesitation in saying, that the master of a ship thus slightly injured would have no other right than to let her lie in port, with all possible precaution against deterioration, until he could hear from the owners.<sup>1</sup> There may be, perhaps, a case in which the master may be justified in selling by a mere *pecuniary* necessity; but this must be extreme and unquestionable; it must be such as to come clearly within the rule already laid down, and make it indisputably certain that the owner himself, if there under similar circumstances, would have found a sale the only thing he could do; for, it must be such as to show that the sale was *clearly* of necessity, and not of *expediency* only.

At one time, a distinction was made between the power of the master if abroad, or if wrecked on the coast of his own country.<sup>2</sup> But this has disappeared. The only rule now is, that he must inform his owners, and wait their instructions, if he can.<sup>3</sup> The general introduction of the electric telegraph will much extend this possibility, and consequent duty. For, let the master be where he may, and the owner far or near, it is certain that he can only dispossess the owner of his property by a sale, when his authority for this rests on necessity, and only when that necessity is such as to preclude intercourse between them without an unreasonable exposure of the property to peril. In other words, if he can become

<sup>1</sup> See *infra*, n. 3, and p. 74, n. 1.

<sup>2</sup> *Scull v. Briddle*, 2 Wash. C. C. 150.

<sup>3</sup> *The Brig Sarah Ann*, 2 Sumn. 206, 215. In this case, Mr. Justice Story states the law as follows: "It has been suggested at the argument, that, as the stranding was on a home shore, at no great distance from the residence of the agent of the owners, the master was not authorized to sell without consulting the agent or the owners. I agree at once to the position, if there is no urgent necessity for the sale. But if such an urgent necessity does exist, as renders every delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on the home shore, or on a foreign shore, whether the owners' residence be near or be at a distance. I am aware of the doctrine maintained by my brother, the late Mr. Justice Washington, in *Scull v. Briddle*, 2 Wash. C. C. 150; and, unless it is to be received with the qualification above stated, I cannot assent to it." Same case affirmed, *New Eng. Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387.



the agent of the owner with instructions, then he cannot be his agent from necessity.<sup>1</sup>

If a sufficient necessity existed, and the master proceeded to make sale, he does so as the agent of the owners, and binds them by his acts or words in the same manner that he would if otherwise authorized to make the sale.<sup>2</sup> But if a master is specially authorized to sell a vessel in a particular manner the owner is not bound if the master exceeds his instructions.<sup>3</sup>

## SECTION V.

### OF THE SALE OF A SHIP UNDER A DECREE OF ADMIRALTY.

The ship is sometimes sold, abroad or at home, under a decree of the court of admiralty. If this be a condemnation as prize, or for forfeiture as contraband, or for smuggling, or for any such cause, or to pay salvage, or discharge a bottomry bond, or to satisfy any of the liens known to the maritime law, it would seem to be

<sup>1</sup> In *Pike v. Balch*, 38 Maine, 302, a vessel on a voyage from Calais, Maine, to New York, was wrecked on an island off Little Machias Bay. There was a telegraph station distant twenty miles from the wreck. It was held, that if the master could "by any available means" in his power communicate with his owners, he was bound to do so. The vessel was sold by the master without notice being given to the owners, and the sale was held to be invalid. And in the *New England Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387, 401, the court say: "The true criterion for determining the occurrence of the master's authority to sell is the inquiry, whether the owners or insurers, when they are not distant from the scene of stranding, can, by the earliest use of the ordinary means to convey intelligence, be informed of the situation of the vessel in time to direct the master before she will probably be lost. If there is a probability of loss, and it is made more hazardous by every day's delay, the master may then act promptly, to save something for the benefit of all concerned, though but little may be saved." See also *The Brig Sarah Ann*, 2 Sumn. 215; *Scull v. Bridle*, 2 Wash. C. C. 150. In *Hall v. Franklin Ins. Co.* 9 Pick. 466, the ship was in no immediate danger of becoming a wreck. It would have taken thirty or forty days to have communicated with the underwriters, and to have received word back. The vessel being sold without notice of her condition being given, the sale was held to be void. See also *Peirce v. Ocean Ins. Co.* 18 Pick. 83; *Stephenson v. Pacific Ins. Co.* 7 Allen, 232.

<sup>2</sup> *Woods v. Clark*, 24 Pick. 35.

<sup>3</sup> *Johnson v. Wingate*, 29 Maine, 404.

valid and binding upon all courts and all parties, unless it be shown to be vitiated by fraud.<sup>1</sup> But if it be merely a decree on a survey, and rest on the ground of unfitness for service, or unseaworthiness, then it would seem that the courts of the country in which the ship belongs will look behind the judgment in admiralty, receiving the decree as of little more authority than the report of surveyors, or a similar statement, on the authority of which it probably rests. And the sale will then be valid or void, accordingly as the actual facts shall show it to have been necessary and justified, or the opposite.<sup>2</sup> The courts of the United States have asserted that this subject is within the general jurisdiction of admiralty, and that such a decree may be made. And there are intimations, perhaps, that such a decree would be the best protection of a master, and that it would be wise in him, therefore, to obtain it. It might be inferred from this, that they would consider such a decree of a foreign court of the same force as a decree of condemnation. But we are of opinion that they would not only inquire into the foundation on which such decree was founded, and into all facts bearing upon the question of jurisdiction, but also into the distinct question whether the facts connected with the condition of the ship were such as justified the decree.<sup>3</sup>

<sup>1</sup> *The Tremont*, 1 W. Rob. 163; *Attorney-General v. Norstedt*, 3 Price, 97; *The Helena*, 4 Rob. 3.

<sup>2</sup> In *Reid v. Darby*, 10 East, 143, Lord Ellenborough remarked, of the exercise by admiralty courts of this jurisdiction: "No instance has been discovered, in which such a power has been exercised in the admiralty court at home; nor can we find any terms in the vice-admiralty commission, or any principle upon which that practice can be sustained, (which certainly, however, has obtained in the vice-admiralty courts abroad,) of decreeing, upon the mere petition of the captain, the sale of a ship reported upon survey to be unseaworthy and not repairable, so as to carry the cargo to the place of its destination, but at an expense exceeding the value of the ship when repaired." The same doctrine is reaffirmed in *Hunter v. Prinsep*, 10 East, 378; *Morris v. Robinson*, 3 B. & C. 196, 203; *The Segredo*, Spinks, Adm. 57. The English court of admiralty, though they admit, yet regret, the want of jurisdiction. *The Fanny & Elmira*, Edw. Adm. 117, 119; *The Warrior*, 2 Dods. 288, 293; *The Pitt*, 1 Hagg. Adm. 240.

<sup>3</sup> Thus, Mr. Justice *Story*, in the case of *The Sch. Tilton*, 5 Mason, 465, 474, says: "To what is suggested in that case (*Reid v. Darby*), as to the want of jurisdiction in the admiralty courts to decree the sale of a ship in a case of necessity upon an application of the master, I, for one, cannot assent. I agree, that in such a case the decree of sale is not conclusive upon the owner or upon third persons, because it is made upon the application of the master, and not in an adverse

The practice of selling by decree of admiralty merely for unseaworthiness is not much known in this country, and the rule which permits such a decree to be examined into so freely is an exception to the general rule, which makes a decree of admiralty *in rem* binding upon all the world. But the reason of this rule in some degree qualifies it. The reason is, that all persons who have an interest in the property may interfere to protect it; but, in order that they may do this, there must be proper notice given, and reasonable opportunity afforded to them to assert and maintain their claims. Probably it would never be a sufficient reason for setting aside a decree of a foreign court of admiralty, that the person who seeks to avoid it had not actual notice or opportunity to present his rights and claims before the court, provided the usual notice and opportunity were given generally, and these were such as would import or carry with them a sufficiency of notice. But if these were wanting, if the proceedings were hastened, or so conducted that all persons interested would be in fact exposed to be deprived of their property unheard, this would taint the decree, and might have the full effect of fraud upon it.<sup>2</sup> So if the property

proceeding. But I cannot but consider it as strictly within the admiralty jurisdiction. It is *primâ facie* evidence of a rightful exercise of authority, but no more. The proceeding, being *ex parte*, cannot be deemed conclusive in favor of the party promoting it." See also *Janney v. Columbian Ins. Co.* 10 Wheat. 411, 418; *Dorr v. Pacific Ins. Co.* 7 Wheat. 581; *Armroyd v. Union Ins. Co.* 2 Binn. 394; *Steinmetz v. United States Ins. Co.* 2 S. & R. 293; *The Dawn, Ware*, 485, 487.

In *Grant v. M'Lachlin*, 4 Johns. 34, an American vessel was captured by a French privateer, and carried into port, but was never condemned as a prize. Subsequently she was employed by the French government to carry passengers to Barracoa, and arrived there in a dismantled condition. After remaining there several months, she was sold by order of the Spanish commissary, and got off and repaired. She subsequently arrived in New York, where her original owners brought an action of trover against the vendee. The court held that the sale was fair and *bonâ fide*, and, being made in accordance with the laws of Spain, was binding on all parties. Mr. Justice Thompson said: "A sale according to the law of the place where the property is must vest a title in the purchaser, which all foreign courts are bound, not only from comity, but on strong grounds of public utility, to recognize. Without this rule, there could be no safety in derivative titles. The only inquiry in these cases is, Was the sale under a competent authority?" Where a sale is made by the advice of surveyors, it is *primâ facie* valid, and the burden of proof is on the party seeking to impeach it. *Gordon v. Mass. Ins. Co.* 2 Pick. 249, 265.

<sup>2</sup> *Sawyer v. Maine Ins. Co.* 12 Mass. 291; *The Mary*, 9 Cranch, 126. In

sold were never within the possession or reach of the court, either actual or constructive, or if the question upon which the case depended was not within their jurisdiction, this would show the proceedings to be either grounded upon a fatal mistake, or upon intentional fraud. But this possession may, as it is now settled, be constructive; for both the English and the American admiralty will, as we shall state more fully in another part of this work, condemn as prize a captured ship which has been carried into a neutral port, and is lying there at the time of the decree.<sup>1</sup>

The court must be a regular court, such as is recognized by the law of nations. It is settled, at least for England and America, that the sufficiency and authority of the court, as well as its jurisdiction, may be inquired into.<sup>2</sup> And the courts of neither country

*Bradstreet v. Neptune Ins. Co.* 3 Sumn. 600, 607, Mr. Justice Story is very explicit upon this point. He says: "If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal, which first punishes and then hears the party — *castigatque, auditque*. It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law; and is but a solemn fraud if it is clothed with all the forms of a judicial proceeding. I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem*, that some specific offence is charged, for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, either personally or by some public proclamation, or by some notification or monition, acting *in rem* or attaching to the thing, so that the parties in interest may appear and make defence, and in point of fact the sentence of condemnation has passed upon *ex parte* statements without their appearance, it is not a judicial sentence, conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs."

<sup>1</sup> *The Christopher*, 2 Rob. Adm. 207; *The Henrick & Maria*, 4 Rob. Adm. 43, 54; affirmed on appeal, 6 Rob. Adm. 139 n.; *The Falcon*, 6 Rob. Adm. 194; *The Comet*, 5 Rob. Adm. 285; *The Victoria*, Edw. Adm. 97; *Hopner v. Appleby*, 5 Mason, 71; *The Arabella & The Madeira*, 2 Gall. 368; *Cheriot v. Foussat*, 3 Binn. 220. But see *contra*, *Wheelwright v. Depeyster*, 1 Johns. 471.

<sup>2</sup> *The Flad Oyen*, 1 Rob. Adm. 185; *The Henrick & Maria*, 4 Rob. Adm. 43;

acknowledge the authority of a consul, nor, indeed, of any other person, sitting as judge in a neutral port under a commission from his own country.<sup>1</sup>

If a ship has been wrecked in a foreign port, and there abandoned, and thereupon the government of that country sell the ship according to the laws thereof, a purchaser in good faith takes a good title.<sup>2</sup>

## SECTION VI.

### WHAT ARE THE APPURTENANCES OF A SHIP.

How much passes by the word "ship," or the phrase "ship and her appurtenances, — or apparel, — or furniture," — or the like, cannot be positively determined by any definition. Stowell and Abbott agree, that whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances, within the meaning of the English statute of 53 Geo. 3, c. 139.<sup>3</sup>

*Assievedo v. Cambridge*, 10 Mod. 77; *Hudson v. Guestier*, 4 Cranch, 293; *Rose v. Himely*, 4 Cranch, 241; *Cheriot v. Foussat*, 3 Binn. 220; *Wheelwright v. Depeyster*, 1 Johns. 471; *Snell v. Faussatt*, 1 Wash. C. C. 271; *Francis v. Ocean Ins. Co.* 6 Cowen, 404; *Ocean Ins. Co. v. Francis*, 2 Wend. 64; *Cucullu v. La. Ins. Co.* 17 Mart. La. 464; *Bradstreet v. Neptune Ins. Co.* 3 Sumn. 600, 605; *Turnbull v. Ross*, 1 Bay, 20.

<sup>1</sup> *The Flad Oyen*, 1 Rob. Adm. 135; *The Kierlighett*, 3 Rob. Adm. 96; *Have-lock v. Rockwood*, 8 T. R. 268; *Wheelwright v. Depeyster*, 1 Johns. 471.

<sup>2</sup> *Grant v. McLachlin*, 4 Johns. 34. In the case of *The Sch. Tilton*, 5 Mason, 465, the vessel being wrecked on the coast of North Carolina, was sold by a wreckmaster as she lay, under the laws of this State; and *Story, J.*, said, p. 479: "Where the sale is made by a wreck commissioner in cases falling within the language of the law, 'without any person present to claim the same as owner,' a very different interpretation ought, as I conceive, to be given to his act. He is there made, *virtute officii*, the agent of the owner for public purposes, and his authority to sell, if exercised in good faith, is conclusive to transfer the property to any purchaser at the sale. . . . Such a sale, however, though generally conclusive upon the title of the owner, is so only in cases of good faith. A statute sale by a public officer may be impeached, as, indeed, more solemn acts may be, for fraud; and the purchaser can protect himself only by showing that he is a *bonâ fide* holder, without notice of, or participation in, the fraud. *A fortiori*, a sale made by the consent of the owner or his agent may be avoided for fraud."

<sup>3</sup> *The Dundee*, 1 Hagg. Adm. 109; *Gale v. Laurie*, 5 B. & C. 156.

To define what would pass by these, or similar words, in a sale, we should add to this definition some expressions denoting that the thing in connection was distinctly connected with the ship and the proper use of her. Usage would have much effect in deciding this question; and it is obvious that things may be part and parcel of a "ship" at one time and place, and under some circumstances, and not at others. In the note we show all that has been done to define the term by adjudications.<sup>1</sup>

<sup>1</sup> In *Kynter's Case*, 1 Leon. 46, it was decided by the court, that *ballast* was not included in the furniture appertaining to a ship, on the ground that the ship may sail without it, as where the cargo serves instead. And this seems to be the reason assigned by Lord *Ellenborough*, in a modern case, *Lano v. Neale*, 2 Stark. 105, for holding that iron kentledge (pigs of iron cast into a particular form for ballast, see McCulloch's Dictionary of Commerce, under "Kentledge"), was not included in a bill of sale of a ship with all her stores, tackle, apparel, etc., in the usual form, "because," said his lordship, "it could not be considered as part of the ship or necessary stores, since common ballast might have been used." So in *Burchard v. Tapscott*, 3 Duer, 363, where the bill of sale conveyed the vessel with her masts, bowsprit, sails, boats, anchors, cables, and all other necessities thereto appertaining and belonging, it was held, that ballast of any kind whatsoever, on board at the time of the sale, would not pass as a necessary appurtenance to the ship. It would seem to be deducible from these cases, that nothing is to be considered an appurtenance of a ship, unless requisite to its proper use, although connected with it at the time.

In *Hoskins v. Pickersgill*, 3 Dong. 222, 2 Marsh. Ins. 727, Lord *Mansfield* was of opinion, that the *boats*, rigging, and stores were included in the insurance on a whaling ship, her tackle, furniture, etc.; but as to the fishing lines, tackle, and stores, the question must depend upon the usage of the trade. The jury negatived the existence of this usage; and when the case came up on motion for a new trial, the judges were unanimous that they were not part of a *ship's* tackle or furniture. Park. Ins. (8th edit.) 126. That *provisions*, put on board for the use of the crew, are protected by a policy on the ship and furniture, was considered as well settled in *Brough v. Whitmore*, 4 T. R. 206. But as to the *boat*, which Lord *Mansfield* likewise included, there seems to exist more uncertainty. Both *Molloy*, B. 2, c. 1, § 8, and *Beawes*, Lex Merc. p. 56, hold that in the sale of a ship, etc., the boat does *not* pass, and the point was determined the same way in an early case in this country. *Starr v. Goodwin*, 2 Root, 71.

On the other hand, in *Briggs v. Strange*, 17 Mass. 405, a boat, cable, and anchor seemed to have been classed together, both by counsel and court, as appurtenances of a ship, which could not be separated from her, so long as they were requisite to her use and safety, but might be attached by the sheriff, when the vessel was at the wharf and stood in no need of them. See also *Roccus*, n. 20; *Straccha de Navibus*, Pars 2, No. 12. In a policy of insurance, the word ship usually includes the boat. *Hall v. Ocean Ins. Co.* 21 Pick. 472; *Emerig. c. 6*, § 7, *Meredith's* ed. 143. See also *Shannon v. Owen*, 1 Man. & R. 392.

A ship would undoubtedly remain and continue to be the same ship, however extensively or frequently repaired; and even if at

So a rudder and cordage purchased for a ship are part thereof. *Woods v. Russell*, 5 B. & Ald. 942. In *Goss v. Quinton*, 8 Man. & G. 825, A ordered a rudder to be made for his ship. The ship-builder began to work upon it, and stated that it was for A. This fact was not communicated to A till after the bankruptcy of the builder, which took place while the rudder was yet unfinished. A, being then informed that the rudder was intended for him, took it away. Held, that the property was in him. This case is, however, doubted in the Exchequer Chamber in the case of *Wood v. Bell*, 6 Ellis & B. 355, 36 Eng. L. & Eq. 148, where it was held, that materials which had been fitted to and formed part of the ship would pass, even though they were not attached to the ship, but that those which had merely been bought for the ship, and intended for it, would not pass. *Jervis, C. J.*, said: "Nothing that has not gone through the ordeal of being approved as part of the ship, passes, in my opinion, under the contract." This decision overrules, in part, the same case in the Queen's Bench, 5 Ellis & B. 772, 34 Eng. L. & Eq. 178. See also *Baker v. Gray*, 17 C. B. 462, 34 Eng. L. & Eq. 387. In *The Alexander*, 1 Dods. 278, a question arose whether a bottomry bond on the ship, her tackle, apparel, furniture, etc., could be enforced against the sails and rigging, which had been, according to the custom of the port, detached from the vessel for safe-keeping, and with the view of being returned to the ship when she was about to sail. The court held that it could.

In the case of *The Dundee*, 1 Hagg. Adm. 109, Lord *Stowell* decided that the *fishing stores* of a vessel engaged in the Greenland fisheries were *appurtenances* of the ship within the meaning of 53 Geo. 3, c. 159, restricting the liability of ship-owners in cases of loss to the value of the ship, freight, etc. "The word *appurtenances*," said he "is a word of wider extent than *furniture*, and may be properly applied to many things that could not be so described (with propriety, at least) in a contract of insurance. It may not be a simple matter to define what is, and what is not, an appurtenance of a ship. There are some things that are *universally* so, things which must be appurtenant to every ship, *quâ* ship, be its occupation what it may. But I think it is rather gratuitously assumed that particular things may not become so, from their immediate and indispensable connection with a ship, in the particular occupation to which she is destined, and in which she is engaged. A ship may have a particular employment assigned to her which may give a speciality to the apparatus that is necessary for that employment. . . . The word 'appurtenances' must not be construed with a mere reference to the abstract, naked idea of a ship; for that which would be an incumbrance to a ship one way employed, would be an indispensable equipment in another, and it would be a preposterous abuse to consider them alike in such different positions. You must look to the relation they bear to the actual service of the vessel."

This decision was affirmed in the Court of King's Bench. *Gale v. Laurie*, 5 B. & C. 156, where it came up on a declaration in prohibition. *Abbott, C. J.*, however, makes a distinction between the use of the word in the statute and in contracts of insurance, which renders it doubtful whether such stores would pass

last all her original materials had disappeared.<sup>1</sup> So, if she were taken to pieces with intent to reconstruct her and this was done.

under a bill of sale of a ship, etc., and leaves it to be determined by usage. "We think," he says (p. 164), "that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this act, whether the object be warfare, the conveyance of passengers or goods, or the fishery. This construction furnishes a plain and intelligible general rule; whereas, if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and much discussion and cavil. It is true, that, in the case of insurance these stores are not considered as covered by an ordinary policy on the ship. But insurance is a matter of contract, and the construction of the contract depends in many cases upon usage. And the construction of a policy can furnish no rule for the construction of this act of parliament, which was passed for purposes of a different nature."

The cargo of a whaling vessel does not pass by a bill of sale of the ship, stores, and their appurtenances. *Langton v. Horton*, 5 Beav. 9, 23 Legal Observer, 524.

A chronometer belonging to the owner, which was on board at the time of the sale, was held to pass by the sale of the ship, the vessel being then at sea. s. c. 6 Jurist, 910. But in a similar case in Maine, the bill of sale was held, in the absence of any agreement of the parties or usage of trade shown, not to include the chronometer as an appurtenance of the ship, Mr. Justice *Emery* remarking, however, "We do not intend to decide but what, in the improvements of nautical science, chronometers may become necessary appurtenances to ships." *Richardson v. Clark*, 15 Maine, 421, 425.

In *The Steamboat Fashion*, Newb. Adm. 67, a steamboat was sold with all her appurtenances. Prior to the sale, the owner had procured a new ash-pan for the boiler, which had been delivered to him, but had not been placed on the boat. Held, that it passed by the bill of sale.

<sup>1</sup> Emerigon, in his treatise on Insurance, ch. 6, § 7, Meredith's ed. 144, says: "A ship is always presumed the same, though all the materials which at first had given it existence have been successively changed: *Navim, si adeo sæpe refecta esset, ut nulla tabula eadem permaneret, quæ non nova fuisset, nihilominus eandem navim esse existimari*. The Athenians preserved the galley of Salamis during more than 1,000 years, from the time of Theseus until the reign of Ptolemy Philadelphus. They were at great pains to replace the old with new planks: and hence arose a great dispute among the philosophers of the time; namely, whether this vessel, of which there did not remain a single original piece, was the same which conveyed Theseus, the conqueror of the Minotaur, in returning from the isle of Crete. The same question even now is stirred on the subject of the Bucentaur, a kind of sacred galley used on Ascension day in every year, by the nobles of Venice, when the doge performs the ceremony of espousing the sea. Though all the members of a body or its parts are changed through the lapse of



But it is said, that, if taken to pieces without this intent and afterwards reconstructed in part, she is a new ship.<sup>1</sup>

It has been held that a mortgage which describes a long list of furniture and other articles in and about a certain hotel at the sea-shore, amongst which were "four schooner-rigged sail-boats," and which concluded the enumeration with the following general clause, "together with all other goods, effects, furniture, chattels, property, things of every name and nature, now used, attached, situate, and being in or about the hotel," would include a fifth schooner-rigged sail-boat used in connection with the hotel.<sup>2</sup>

## SECTION VII.

### OF THE POSSESSION OF THE PURCHASER.

✓ The ship, although only a personal chattel, is one of a peculiar character; and these peculiarities introduce some modifications in the principles of the law of sale, or in the application of them; particularly in the rule as to delivery and possession. This rule, in reference to chattels generally, is, that if possession do not pass at once, or with but little delay, it is a badge of fraud, and the sale is defeated. But a ship may be sent to sea, not merely to go to the antipodes, but to pass from port to port as profitable engagements shall offer, for many years. It is certain, however, that the owner should, in the mean time, be able to sell his ship, if he wishes to. And the rule which we would lay down is this: that a *bonâ fide* sale, on consideration, with whatever transfer of papers and of registry can be made, is valid, if possession be taken by the purchaser as soon as is practicable by reasonable endeavor, however long it may be before such possession is or can be taken.

The principles, we should say, are these: first, that the sale, time, nevertheless, by force of substitution the body is still presumed the same: *Licet spatio temporis singula corpora mutantur, tamen, mediante subrogatione, semper dicitur eadem res.* It is always the same people, the same senate, the same legion, the same edifice, the same flock, the same ship, etc.; *Idem populus, eadem navis, idem ædificium, idem grex, idem vivarium,*" etc. See also Malynes's *Lex Merc.* 123.

<sup>1</sup> Molloy, Book 2, ch. 1, § 6.

<sup>2</sup> *Veazie v. Somerby*, 5 Allen, 280.

meaning a transfer on good consideration and in good faith, does not merely give an inchoate right, to be completed by possession ; but does in fact pass the whole property in the ship, and is a complete transfer thereof, vesting the same in the purchaser, but liable to be divested by his laches in taking possession. The second would be this : that the purchaser is not bound to take possession as soon as possible by any means ; he is not bound to go, or send an agent, or even transmit authority at once to a foreign and a distant port ; but may, generally at least, wait her arrival in her home port. He ought, however, in prudence, if not in law, to forward notice of the sale and transfer, to the master of the ship (which has been held equivalent to taking possession), and also to cause his name to appear on the register of the United States as owner, as soon as practicable, that he may give the public whatever notice such a record gives.

The distinction we make in the first principle is of much practical importance. If such a sale gives only an inchoate right, to be completed by possession, then, of two innocent transferees, the one who can by any means get possession first, prevails over the other. This we deny to be the law, and hold that the cases which seem to lead to this conclusion are either erroneous, or are to be justified only by their peculiar circumstances. Undoubtedly, priority of possession may lead to an inference of laches in him who does not get possession ; but it by no means proves it ; and that is the only question. This will always be a question of mixed law and fact, and may sometimes be a difficult one. We say, however, that a subsequent purchaser cannot defeat the title of an earlier purchaser, by using means to get possession which the first purchaser either could not use or was not bound to use, and the non-user of which was not laches. Even that court which has permitted a second purchaser to complete his title by a first possession, and defeat a former purchaser without laches, has held that an attaching creditor has not a similar right. For if there be a sale in good faith, and then an attachment by a creditor of the seller ; and after that, but without any laches, possession is taken by the purchaser, the attachment is defeated.<sup>1</sup>

<sup>1</sup> Both in England and in this country, such a transfer, whether absolute or by way of mortgage, or in trust, is valid, provided the vendee or mortgagee take possession of the ship within a reasonable time after her arrival in port. Such

If, however, the vessel is where the purchaser can take immediate actual possession being requisite, not to vest the property in him,—for this is completed by the livery of the bill of sale, or other muniments of title, *Lord v. Ferguson*, 9 N. H. 380; *Brooks v. Bondsey*, 17 Pick. 441,—but to exclude the operation of the statutes of James I. and Elizabeth, where they are recognized, and generally because a failure to take possession is evidence of fraud. *Ex parte Matthews*, 2 Ves. Sen. 272; *Atkinson v. Maling*, 2 T. R. 462; *Gordon v. East India Co.* 7 T. R. 228, 234; *Robinson v. Macdonnell*, 5 M. & S. 228; *Philpot v. Williams*, 2 Eden, Ch. 231; *Ex parte Batson*, 3 Bro. Ch. 362; *Kirkley v. Hodgson*, 1 B. & C. 588; *Mair v. Glennie*, 4 M. & S. 240; *Hay v. Fairbairn*, 2 B. & Ald. 193; *Portland Bank v. Stubbs*, 6 Mass. 422; *Portland Bank v. Stacey*, 4 Mass. 661; *Putnam v. Dutch*, 8 Mass. 287. In *Lamb v. Durant*, 12 Mass. 54, 56, *Parker, C. J.*, held it to be well settled that such a conveyance by deed passes the property. But the distinction, if any was meant, is not recognized in the other cases. See *Tucker v. Buffington*, 15 Mass. 477; *Badlam v. Tucker*, 1 Pick. 389; *Gardner v. Howland*, 2 Pick. 599; *Joy v. Sears*, 9 Pick. 4; *Pratt v. Parkman*, 24 Pick. 42; *Turner v. Coolidge*, 2 Met. 350; *Winsor v. McLellan*, 2 Story, 492; *Brinley v. Spring*, 7 Greenl. 241; *Morgan v. Biddle*, 1 Yeates, 3; *Wheeler v. Sumner*, 4 Mason, 183; *D'Wolf v. Harris*, 4 Mason, 515; *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 449; *Cato v. Irving*, 5 De Gex & S. 210, 10 Eng. L. & Eq. 17. But the purchaser takes possession subject to all valid claims before notice of transfer. See cases *supra*, also *Gillespy v. Coutts, Ambler*, 652. It is true that in *Portland Bank v. Stubbs*, 6 Mass. 422, 425, *Parsons, C. J.*, says: "The conveyance by Weeks & Son to the plaintiffs being a mortgage, it is a pledge of a personal chattel. But to such a pledge a delivery of the chattel is essential to give the pawnee a special property in it. And although a ship at sea may be mortgaged, yet the mortgagee must take possession as soon as he may on her return, before the mortgage is complete." But by this is meant only that it is not complete in regard to a third person without notice. The cases also of *Lamb v. Durant*, 12 Mass. 54, and *Lanfear v. Sumner*, 17 Mass. 110, have been supposed to support the doctrine that as between two innocent purchasers he who first acquires actual possession completes his title as against the other; and the latter case has been questioned on that ground. *Ingraham v. Wheeler*, 6 Conn. 277, 284; *Ricker v. Cross*, 5 N. H. 570, 573. See also 6 Law Reporter, 95. This is owing, we think, to a misunderstanding of the principles on which those cases were decided. It is well settled, that, as between the parties, the property in goods sold will pass to the vendee, although the possession may remain in the vendor. But under the statute of 13 Elizabeth, to render the transfer valid as to third parties without notice, there must be a change of possession. 1 *Parsons on Contracts*, 441, 442; *Twyne's case*, 1 *Smith's Lead. Cas.* 1. But, where actual delivery is impossible, constructive, or, as it is sometimes called, symbolical delivery, is sufficient. The difficulty has arisen from overlooking this fact. In both *Ingraham v. Wheeler* and *Ricker v. Cross* there was a delivery of this nature. But in *Lamb v. Durant* and *Lanfear v. Sumner* this was not the case. In the latter, the goods were supposed by their owners in Philadelphia to be at sea. They were actually landed in Boston. A written assignment was made in Phila-

diate possession of her and does not, an oral sale is ineffectual to pass the title against a subsequent *bond fide* purchaser.<sup>1</sup>

The effect of an entry of a transfer in the custom-house record, delphia and delivered, but no money was paid, no bill of lading transferred, and there was no pretence whatever of any symbolical delivery. The goods were subsequently attached by creditors of the vendors, and possession taken by the sheriff, against whom the action was brought. The court did not deny, that, if there had been a legal, as distinguished from an actual delivery to the first purchaser, his title would have been protected. See also *Gardner v. Howland*, 2 Pick. 599, 602, per *Parker, C. J.* In *Lamb v. Durant*, the vessel was owned by a firm. One partner was abroad, and in actual possession of the vessel. It was held, that, under the circumstances of the case, a transfer by the home partner must be subject to all incumbrances made by the partner in possession before notice of transfer, and that accordingly a sale with delivery of possession by the latter would intercept the title attempted to be passed by a sale by the former. In such a case it might well be held that there could be no constructive delivery by the home partner. See *Hewitt v. Sturdevant*, 4 B. Mon. 453. The purchaser must, however, take possession within a reasonable time after the vessel arrives in port, and what is such a reasonable time is a question for the jury to determine from all the circumstances of the case. *Joy v. Sears*, 9 Pick. 4. Possession must be taken before the departure of the vessel on a new voyage, where the transferee is aware of her arrival in port. *Ex parte Matthews*, 2 Ves. Sen. 272. In *Brinley v. Spring*, 7 Greenl. 241, the court say that it may be deduced from the case of *Mair v. Glennie*, that notice to the captain supersedes the necessity of taking possession of the ship. So in *Turner v. Coolidge*, *supra*, the court strongly inclined to the opinion, that the possession of one part-owner who acted for himself and also for the other part-owner, who had purchased the rest of the vessel, superseded the necessity of the vendee's taking formal possession, and vested the property in him. See also *Addis v. Baker*, 1 Anstr. 222; *Winsor v. McLellan*, 2 Story, 492. Where the assignment is conditional, as in the case of a mortgage, an agreement that the mortgagor shall remain in possession until condition broken likewise relieves the mortgagee from the obligation to take possession. *Badlam v. Tucker*, 1 Pick. 389; *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 449. As to the consequences of allowing the assignor to remain in possession, where there is no such agreement in the bill of sale, and the ship is not at sea, under 21 Jac. c. 19, § 11, see *Monkhouse v. Hay*, 2 Brod. & B. 114; *Robinson v. McDonnell*, 2 B. & Ald. 134; *Stephens v. Sole*, cited in *Ryall v. Rowles*, 1 Ves. Sen. 352; *Hall v. Gurney*, 24 Geo. 3, B. R. 1 *Cooke's Bankrupt Laws*, 342. It would seem in accordance with the general principle governing such transfers, that it is not essential to their validity that the ship should be *at sea* at the time, provided she is equally beyond the immediate control of her owner, and accordingly in *Ex parte Batson*, 3 Bro. Ch. 362, and in *Putnam v. Dutch*, 8 Mass. 287, the court held a sale of a vessel in another port to be effective, provided the vendee was guilty of no laches in taking possession on her arrival in the port where he resided.

<sup>1</sup> *Veazie v. Somerby*, 5 Allen, 280.

or of a registration of the purchaser, as owner, or of the want of such registration, presents questions connected somewhat with that which we have just considered. The question is, in fact, whether this custom-house record is intended to be, or is in law, a public record, having a similar effect upon title that the public registry of deeds has on land titles. That is, is an entry of transfer or title in that registry, public notice to all the world; and where there is no such register, can a subsequent transferee hold unless, — agreeably with the equitable construction of the statutes of land registry, — a knowledge of the transfer can be brought home to him, which shall have, so far as he is concerned, the same effect as a public registry? This subject has already been fully considered, and we refer to what we have said upon it in a former section and notes.<sup>1</sup>

If a bill of sale of a vessel is given, absolute on its face, but which by a collateral agreement between the parties is defeasible on certain conditions, third persons cannot avail themselves of such conditions to defeat the title of the grantee.<sup>2</sup>

### SECTION VIII.

#### HOW FAR THE COMMON RULES RESPECTING THE SALE OF A CHATTEL APPLY TO THE SALE OF A SHIP.

The common rules as to evidence, agency, warranty, and the like, in respect to sales of personal property, apply to the sales of ships. Thus, for example, if a ship is ordered to be built for a particular purpose, there is an implied warranty that she shall be fit for that purpose.<sup>3</sup> So, also, the rule of *caveat emptor* ap-

<sup>1</sup> See p. 42, note 3, and sect. 1, of this chapter.

<sup>2</sup> *The Ocean*, 1 Sprague, 535.

<sup>3</sup> See *Shepherd v. Pybus*, 3 Man. & G. 868; *Chambers v. Crawford*, Addison, 150. In *Cunningham v. Hall*, 4 Allen, 268, which was an action for breach of contract in building a ship, it was held that if the purchaser designates the material of which the vessel is to be built, the builder is not liable for any loss or damage which may result from the imperfection of, or natural defects in that kind of material; that the warranty in such a case is that the builder possesses the knowledge and skill requisite to use the materials properly and in the most advan-

plies.<sup>1</sup> But material representations, made to affect the sale, and doing this, have much the same effect as warranty.<sup>2</sup> If, however, the contract of sale be reduced to writing, it would, generally at least, be very difficult to add new stipulations, or introduce representations and assertions, merely by oral evidence.<sup>3</sup> If the ship be sold, as is done more often abroad than in this country, "with all her faults," this was once held to make it obligatory on the seller to disclose a fault which the buyer could not possibly ascertain.<sup>4</sup> The later and prevailing doctrine seems to be, that the seller may, under such a sale, be silent as to any or all the faults which he knows, without any reference to the buyer's ability to discover them; but he must not be *active* in concealing them, for this is a positive fraud.<sup>5</sup> The rule cannot be better illustrated than by the old dic-

tageous manner, and that he will use all reasonable care and skill in the selection of them, and in the application of all known and proper tests to discover unsoundness. The vessel in this case was planked with yellow pine, and a plank at the end of the first voyage was found defective. On the same facts Judge Sprague held the builder liable, 1 Sprague, 404. On appeal to the Circuit Court the case was dismissed for want of jurisdiction, September, 1858.

<sup>1</sup> But the law of Louisiana imposes upon the seller the obligation of warranting the vessel sold against its hidden defects, which are those which could not be discovered by simple inspection. *Bulkley v. Honold*, 19 How. 390.

<sup>2</sup> *Schneider v. Heath*, 3 Camp. 506; *Shepherd v. Kain*, 5 B. & Ald. 240. See, however, *Dyer v. Lewis*, 7 Mass. 284.

<sup>3</sup> *Pickering v. Dowson*, 4 Taunt. 779; *Freeman v. Baker*, 5 B. & Ad. 797, 5 C. & P. 475; *Kain v. Old*, 2 B. & C. 627; *Mumford v. M'Pherson*, 1 Johns. 414.

<sup>4</sup> *Mellish v. Motteux*, Peake, Cas. 115.

<sup>5</sup> In *Baglehole v. Walters*, 3 Camp. 154, the bill of sale contained the words, "in excellent condition"; but it does not appear whether or not the defects alleged by the vendee were such as to render such a description materially incorrect, and no notice is taken of this circumstance by the court. "I cannot," said Lord *Ellenborough*, "subscribe to the doctrine of *Mellish v. Motteux* (*supra*), although I feel the greatest respect for the authority of the judge by whom it was decided. Where an article is sold 'with all faults,' I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. . . . It would be most inconvenient and unjust, if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, I think there is no fraud, unless the seller, by positive means, renders it impossible for the pur-

tum in Rolle's Reports, as commonly understood ; if one sells a blind horse, he is not held without warranty ; but if he sells a horse whose missing eye is supplied by a glass eye, he is liable for the deceit.<sup>1</sup>

chaser to detect latent faults." See also *Schneider v. Heath*, 3 Camp. 506. If a ship is represented to have been built in a certain year, whereas she was launched the year previous, the buyer may recover damages for the deceit, though she was sold with all her faults. *Fletcher v. Bowsher*, 2 Stark. 561.

And where the ship was described in the bill of sale as "copper-fastened," whereas she was in reality only partially so, and not what was known in the trade as a copper-fastened vessel ; this was considered a breach of warranty. "With all faults," say the court, "must mean with all faults which it may have consistently with its being the thing described. Here the ship was not a copper-fastened ship at all." *Shepherd v. Kain*, 5 B. & Ald. 240. See *Smith v. Richards*, 13 Pet. 41.

Where the bill of sale represented the vessel to be of greater dimensions and burden than she really was, it was held that the vendee could not maintain case against the vendor for false affirmation and promise. *Dyer v. Lewis*, 7 Mass. 284. The court do not seem to have considered this description as in the nature of a warranty. See also *post*, c. 8, sect. 2. So in a late English case, *Taylor v. Bullen*, 5 Exch. 779, 1 Eng. L. & Eq. 472, where the ship was described as "the fine teak-built bark Intrepid, A No. 1, well adapted for a passenger ship," and the document concluded with the words, "to be taken with all faults, without any allowance for deficiency, etc., or any defect or error whatsoever. The plaintiff declared on a breach of warranty, alleging that the ship was not "teak built," nor A No. 1, nor well adapted for a passenger ship. The court were of opinion that this was not a warranty of anything more than that the vessel in question was a bark, and that all errors of description were protected by the clause, "without allowance for any error." *Shepherd v. Kain* was admitted by the court to be correct, but it was held that the words at the bottom of the memorandum were used for further protection.

This knowledge of the vendor of the existence of the defects, we have seen, is immaterial, if he use no deceit in order to conceal them, and evidence of parol representations as to the condition of the ship is not generally admissible where there is a bill of sale ; but where these two circumstances concur, that is, where the vendor knowingly makes such misstatements, this we presume would be conclusive evidence of fraud, sufficient to vitiate the bill of sale. See the cases, *supra*.

<sup>1</sup> *Southerne v. Howe*, 2 Rol. R. 5. "*Si home vend chivall que est lame null action gist pour ceo, mes caveat emptor ; lou jeo vend chivall que ad null oculus la null action gist ; autrement lou il ad un counterfeit faux et Bright Eye.*" These words have generally been understood as in the text ; but Mr. Oliphant, in his work on Horses, p. 73, says : "Probably by 'Bright Eye' is meant 'glass eye,' or *gutta serena* (which is a palsy of the optic nerve, and very difficult to detect), and the words 'counterfeit et faux' may be an attempt of the reporter to explain an ex-

Where a bill of sale is made of a vessel in the ordinary form, and absolute in its terms, the purchaser cannot show by parol that there was an agreement between him and the seller that the title should not vest in the purchaser until the completion of repairs which were then making upon her, but in defence of a claim by the vendor of an allowance for the purchaser's proportion of the expense of such repairs, the purchaser may show by parol that the seller agreed to pay for the repairs himself.<sup>1</sup> And generally it may be shown that a person was the owner of a vessel prior to the date of the bill of sale to him.<sup>2</sup>

To prove that, at the time of the sale of a portion of a vessel, an agreement was made that the seller should pay for the repairs about to be made, it is competent to show the value of the vessel, and the opportunities of the purchaser to examine her, and the progress made in repairing her; but a usage or custom that it was unusual for a master to buy "a master's interest" in a vessel undergoing repairs, without making a specific agreement in regard to them, is not admissible.<sup>3</sup>

If a contract provides that a vessel shall be built, caulked, finished, and ready for the rigger to complete his work, launched and delivered afloat on or before a certain day, the builder must have the vessel ready for the rigger so long before that day, that the rigging may be completed, and the vessel launched on that day.<sup>4</sup>

pression which he did not understand. Because putting a glass eye into a horse is very far in advance of the sharpest practice of the present day, or of any former period." This seems reasonable; and then the case cannot be cited to illustrate the law of sale as stated in the text, which, however, rests upon sufficient reason.

<sup>1</sup> *Rennell v. Kimball*, 5 Allen, 356. The sale in this case was of part of a vessel only, the vendor still retaining the controlling interest.

<sup>2</sup> *Veazie v. Somerby*, 5 Allen, 280.

<sup>3</sup> *Rennell v. Kimball*, 5 Allen, 356.

<sup>4</sup> *Curtis v. Brewer*, 17 Pick. 513.



## CHAPTER IV.

## OF PART-OWNERS.

## SECTION I.

## HOW PARTNERSHIP IN VESSELS IS CREATED.

Two or more persons may own a ship by building it together, or purchasing it together, or by each purchasing a part. However it be acquired, they are tenants in common and not joint-tenants, unless by force of a special agreement between them. Therefore if one dies, his share goes to his representatives, and not to the surviving part-owners.<sup>1</sup> If the register or instrument of transfer, or written evidence of ownership, do not define the proportions in which the owners hold the property, they will, in the absence of proof to the contrary, be presumed to have equal shares.<sup>2</sup>

<sup>1</sup> In a note in Abbott on Shipping, p. 97, first introduced by the author in the fourth edition, it is supposed, that, if a ship were granted to a number of persons generally, without distinguishing in any way the shares of each, they would become joint-tenants at law, and that the rule *jus accrescendi inter mercatores locum non habet* could be enforced only in equity. For this doctrine no authority is cited, and we are confident that it is not the law. That part-owners are tenants in common has been settled in numerous cases. *Graves v. Sawcer*, T. Raym. 15; *Ex parte Young*, 2 Ves. & B. 242, 2 Rose, 78 n.; *Ex parte Harrison*, 2 Rose, 76; *Owston v. Ogle*, 13 East. 538; *Helme v. Smith*, 7 Bing, 709; *Rex v. Collector of the Customs*, 2 M. & S. 223; *Green v. Briggs*, 6 Hare, 395; *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Mumford v. Nicoll*, 20 Johns. 611; *Lamb v. Durant*, 12 Mass. 54; *Merrill v. Bartlett*, 6 Pick. 46; *Thorndike v. DeWolf*, 6 Pick. 120; *French v. Price*, 24 Pick. 13; *Harding v. Foxcroft*, 6 Greenl. 76; *Patterson v. Chalmers*, 7 B. Mon. 595, 598; *Milburn v. Guyther*, 8 Gill, 92; *Jackson v. Robinson*, 3 Mason, 138; *Macy v. DeWolf*, 3 Woodb. & M. 193, 205; *Knox v. Campbell*, 1 Penn. State, 366; *Hopkins v. Forsyth*, 14 Penn. State, 34, 38; *Buddington v. Stewart*, 14 Conn. 404; *Revens v. Lewis*, 2 Paine, C. C. 202; *Williams v. Sheppard*, 1 Green, N. J. 76.

<sup>2</sup> *Glover v. Austin*, 6 Pick. 209, 221, per *Parker*, C. J.; *Ohl v. Eagle Ins. Co.* 4 Mason, 172; *Alexander v. Dowie*, 1 H. & N. 152, 37 Eng. L. & Eq. 549, 551, per *Pollock*, C. B. But the Act of 1850, c. 27, § 5, 9 U. S. Stats. at Large, 441,

A ship, like any other chattel, may be held in partnership, and constitute a part of the stock in the firm.<sup>1</sup> And then all the powers, duties, and obligations of the owners towards each other will be determined by the law of partnership. Thus one partner may sell<sup>2</sup> or mortgage<sup>3</sup> the entire interest of the firm in the vessel; and it is immaterial whether this is done by signing the firm name or the name of each copartner separately.<sup>4</sup> Such a conveyance need not be under seal, but the addition of a seal does not vitiate the transaction.<sup>5</sup>

If persons who own a ship as part-owners, and not as partners, equip and fit the ship out in all respects, and load her and send her forth upon adventure, in the cost and profit and control of which they are to share as partners would, there seems no reason for denying that they hereby form a partnership, or at least a *quasi* partnership for this voyage and adventure;<sup>6</sup> and that the law of partnership will apply to it so far as to give each of them a lien on the property for his disbursements and advances, for and upon this ship and voyage, and render them liable in the same way as partners;<sup>7</sup> although it might be doubted, perhaps, whether, if the partnership be such a constructive one, it would give to each part-owner the absolute power of disposing of the whole

provides that "the part or proportion of the vessel belonging to each owner, shall be inserted in the register of enrolment."

<sup>1</sup> *Doddington v. Hallett*, 1 Ves. Sen. 497; *Wright v. Hunter*, 1 East, 20; *Mumford v. Nicoll*, 20 Johns. 611; *Harding v. Foxcroft*, 6 Greenl. 76; *Phillips v. Purington*, 15 Maine, 425; *Seabrook v. Rose*, 2 Hill, Ch. 553; *Patterson v. Chalmers*, 7 B. Mon. 595; *Hewitt v. Sturdevant*, 4 B. Mon. 453.

<sup>2</sup> *Lamb v. Durant*, 12 Mass. 54.

<sup>3</sup> *Patch v. Wheatland*, 8 Allen, 102; *Milton v. Mosher*, 7 Met. 244.

<sup>4</sup> *Patch v. Wheatland*, 8 Allen, 102.

<sup>5</sup> *Milton v. Mosher*, 7 Met. 244.

<sup>6</sup> *Doddington v. Hallett*, 1 Ves. Sen. 497; *Mumford v. Nicoll*, 20 Johns. 611, reversing the decision of Chancellor *Kent* in the same case, 4 Johns. Ch. 522. See also *Macy v. DeWolf*, 3 Woodb. & M. 193; *Hewitt v. Sturdevant*, 4 B. Mon. 453; *Hinton v. Law*, 10 Mo. 701; *Gardner v. Cleveland*, 9 Pick. 334; *Julio v. Ingalls*, 1 Allen, 41; *Bulfinch v. Winchenbach*, 3 Allen, 161; *Pragoff v. Heslep*, 1 Am. Law Reg. 747. See, however, *Hopkins v. Forsyth*, 14 Penn. State, 34, 38.

<sup>7</sup> *Doddington v. Hallett*, 1 Ves. Sen. 497; *Holderness v. Shackels*, 8 B. & C. 612, 3 Man. & R. 25; *Mumford v. Nicoll*, 20 John. 611, 625; *Hewitt v. Sturdevant*, 5 B. Mon. 453, 466; *Starbuck v. Shaw*, 10 Gray, 492; *Pragoff v. Heslep*, 1 Am. Law Reg. 747.

property, in the same way in which a partner would have that power.<sup>1</sup>

There is certainly no right of survivorship among part-owners of a ship; and it is said *jus accrescendi, inter mercatores, pro beneficio commercii locum non habet*.<sup>2</sup>

It has been held, that all the part-owners of a ship must be parties to a bill filed for an account of the profits of the ship,<sup>3</sup> however arising, or in whatever form existing; because the claims for freight or cargo follow the general law of partnership.<sup>4</sup>

A copartner may transfer his interest in the copartnership effects to any one; but he cannot introduce any other person into the firm as a partner, either by transfer to him, or in any other way, without the consent of the other partners.<sup>5</sup> But a part-owner may transfer his share of a ship to any person, and the transferee acquires at once all the rights and powers, as well as all the interest which the transferer possessed.<sup>6</sup> No part-owner can sell anything more than his own share in the ship, unless authorized by

<sup>1</sup> *Hewitt v. Sturdevant*, 4 B. Mon. 453, 466. In this case it was held, that, where a steamboat was built to carry freight and passengers, and not to be sold, although held in partnership by her owners, one could not sell without the consent of the others.

<sup>2</sup> See *ante*, p. 90, note 1, and *Bulkley v. Barber*, 6 Exch. 164, 1 Eng. L. & Eq. 506.

<sup>3</sup> *Moffatt v. Farquharson*, 2 Brown, Ch. 338. See *East India Co. v. Neave*, 2 Ves. Jr. 317. This, however, is not now the law in cases when the number of the owners or parties in interest is so great that it would be impracticable or inconvenient to make them all parties. In this case, a bill may be brought by one part-owner on behalf of himself and the others. *Good v. Blewitt*, 13 Ves. 397. See also *Lloyd v. Loaring*, 6 Ves. 773, 779; *Adair v. New River Co.* 11 Ves. 429; *Cockburn v. Thompson*, 16 Ves. 321; *Pearce v. Piper*, 17 Ves. 11, 15, 16. In *Pierson v. Robinson*, 3 Swanst. 139, n., which was a bill by the captain of a vessel for a debt due, it appeared that at the time the debt was incurred there were two part-owners, A and B. A afterwards bought out B's share and died. This bill was brought against the executor of A only, for a discovery of assets and for a satisfaction thereof of the debt. The bill suggested the death of B before A, but this fact was not proved. It was held that B or his representative ought to have been made a party to the bill. The Lord Chancellor stated that, this not having been done, the court could only decree for a moiety, or order the cause to stand over, with liberty to add parties.

<sup>4</sup> *Green v. Briggs*, 6 Hare, 395.

<sup>5</sup> *Collyer on Partnership*, 4; *Story on Partnership*, § 5; *Ex parte Barrow*, 2 Rose, 252, 255; *Crawshay v. Maule*, 1 Swanst. 495, and note (a), p. 509.

<sup>6</sup> See *Oviatt v. Sage*, 7 Conn. 95.

some other part-owner to sell as his agent.<sup>1</sup> It has been recently held in New York, that the several owners of vessels which are owned in shares, though tenants in common as to the ownership of the vessel, are partners in regard to its earnings.<sup>2</sup>

As part-ownership is the usual form of ownership of a ship, and partnership is the exception, the former will be presumed until the latter is proved.<sup>3</sup>

## SECTION II.

### OF THE POWERS OF A PART-OWNER.

The general rules of cotenancy of a chattel apply to this case. Thus, if a part-owner sells the whole ship, or the share of another part-owner, they whose shares he sells may, if they please, confirm and ratify the sale; and then it takes effect as their sale;<sup>4</sup> but without such confirmation it is wholly void. And it seems to be now held, that an unauthorized sale by a part-owner of the whole vessel, if carried into effect, is a constructive destruction of the property of the other owners, and trover may be maintained by them against the seller, or against the purchaser, if he also sells the property as his own.<sup>5</sup> But trover does not lie against a part-owner of a ship, or, indeed, any tenant in common, for merely dispossessing his co-owner;<sup>6</sup> nor can one part-owner maintain reple-

<sup>1</sup> *Henshaw v. Clark*, 2 Root, 103.

<sup>2</sup> *Merritt v. Walsh*, 32 N. Y. 685.

<sup>3</sup> *Patterson v. Chalmers*, 7 B. Mon. 595.

<sup>4</sup> *Oviatt v. Sage*, 7 Conn. 95; *Putnam v. Wise*, 1 Hill, 234.

<sup>5</sup> *Weld v. Oliver*, 21 Pick. 559; *White v. Osborn*, 21 Wend. 72; *Hyde v. Stone*, 9 Cow. 230, 7 Wend. 354; *Wilson v. Reed*, 3 Johns, 175; *Thompson v. Cook*, 2 South. 580; *Farr v. Smith*, 9 Wend. 238. See also, on this point, *Barton v. Williams*, 5 B. & Ald. 395; *Farrar v. Beswick*, 1 M. & W. 682, per *Parke, B.*; *Mayhew v. Herrick*, 7 C. B. 229.

<sup>6</sup> *Fennings v. Grenville*, 1 Taunt. 241; *Selden v. Hickcock*, 2 Caines, 166; *Mersereau v. Norton*, 15 Johns. 179; *Hyde v. Stone*, 9 Cow. 230; *Hurd v. Darling*, 14 Vt. 214. There appears to be some controversy as to what will authorize one tenant in common to commence an action against a co-tenant. In the old case of *Graves v. Sawcer*, T. Raym. 15, the court held that case would not lie at the suit of one part-owner against another for fraudulently carrying the ship to foreign parts, and there converting her to his own use, for "there cannot

vin against another ;<sup>1</sup> nor, perhaps, bring trespass for the sale of the whole.<sup>2</sup> Neither can a part-owner recover damages against another at law, for fraudulently and deceitfully sending the ship on a foreign voyage, whereby she was lost ;<sup>3</sup> nor in equity for the loss of a ship sent to sea against his consent.<sup>4</sup>

be any fraud between tenants in common, because the law supposes a trust and confidence between them." See the same case, reported 1 Lev. 29, 1 Keble, 38. But in the subsequent case of *Barnardiston v. Chapman*, cited 4 East, 121, the plaintiff was tenant in common of one moiety of a ship, and the defendants cotenants of the other moiety. The defendants took the vessel by force from the possession of the plaintiff, and sent it to Antigua, where it was lost. It was contended that trover would only lie in case of an actual destruction, to which *King, C. J.*, agreed, but left it to the jury whether, if it was found that the ship was taken away by force and secreted and carried beyond the reach of the plaintiff, an ensuing loss would not amount to a destruction. The jury found that it would, and the court unanimously agreed to the directions of the chief justice, and refused to grant a new trial. And in *Lowthorp v. Smith*, 1 Hayw. N. C. 255, the court state the law as follows : " If one of two joint-owners takes possession of the whole, no action will lie for this, for one hath as much right to the possession as the other ; but if, after taking possession, he destroys the property, he is then liable, because the joint-ownership does not empower him to destroy the property of the other ; and if such joint-owner, after getting the sole possession, shall, without the consent, or against the will of the other owner, send the vessel to sea, and she be lost in that voyage, the jury may consider such loss as a destruction of the vessel, occasioned by the joint-owner by means of sending her to sea, and find for the plaintiff." And so, generally, if a tenant in common, though rightfully in possession, yet by negligence causes the destruction of the property, an action will lie against him. *Chesley v. Thompson*, 3 N. H. 9 ; *Herrin v. Eaton*, 13 Maine, 193 ; *Maddox v. Goddard*, 15 Maine, 218 ; *Anders v. Meredith*, 4 Dev. & B. 199. But in *Moody v. Buck*, 1 Sandf. 304, where one of two joint-owners of a vessel took upon himself the management, direction, and control of the whole vessel, and by his carelessness, inattention, and negligent and improper conduct the vessel took fire and was consumed, it was held that he was not liable to the other part-owner. See also, as to actions between part-owners of a ship generally, *Milburn v. Guyther*, 8 Gill, 92 ; *Guillot v. Dossat*, 4 Mart. La. 203.

<sup>1</sup> *Barnes v. Bartlett*, 15 Pick. 71.

<sup>2</sup> *Furlong v. Bartlett*, 21 Pick. 401.

<sup>3</sup> See *ante*, p. 93, note 6.

<sup>4</sup> *Anonymous, Skinner*, 230 ; *Strelly v. Winson*, 1 Vern. 297. It is said in *Horn v. Gilpin*, Amb. 253, that the reason for the decision in *Strelly v. Winson* is not stated correctly in the reports, the real ground of the decision being that the part-owner did not expressly dissent. These were cases between the part-owners.

It is said, that, at common law, the majority of the part-owners may control and employ the ship at their pleasure, and put on board or remove whatever officers or masters they choose.<sup>1</sup> We doubt, however, whether this majority could dispossess a master who was himself a part-owner,<sup>2</sup> although such master, if dis-

<sup>1</sup> Gould v. Stanton, 16 Conn. 12.

<sup>2</sup> In *The New Draper*, 4 Rob. Adm. 287, 290, an action was instituted by the majority of the part-owners against a part-owner who was the master, to dispossess him of the command. Sir William Scott said: "The dispossession of a master is in its nature not an uncommon proceeding; all that the court requires, in cases where the master is not an owner, is, that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master and part-owner, something more is required before the court will proceed to dispossess a person who is also a proprietor in the vessel, and whose possession, therefore, the common law is upon general principles inclined to maintain. It is not, however, by any means unprecedented for this court to proceed even to that extent; but then some special reason is commonly stated to induce the court to interpose." See also *Boulay Paty*, Droit. Comm. Tom. 1, tit. 3, § 5. In the case of a foreign ship, as a general thing, the court will not interfere, on application of the other part-owners, to dispossess a captain who is also an owner. *The Johan & Siegmund*, Edw. Adm. 242. The court, however, in a subsequent case exercised the power where a decree of the tribunal of the country to which the vessel belonged, exercising admiralty jurisdiction, was produced, directing the master to deliver up the vessel. *The See Reuter*, 1 Dods. 22. It is very clear that if the interest of an owner of a minor interest in a vessel is sold on execution, the fact that he is also master does not entitle the purchaser of such minor interest to turn the master out. *Loring v. Illsley*, 1 Calif. 74. There is a prevailing notion in the mercantile community that a master's interest, as it is called, in a vessel, entitles the person holding it to go as master, and that he cannot be turned out without good cause. And there seems to be no good reason why an owner has not a perfect right to sell an interest in his vessel to a master, and agree with him that he shall go as master either for one voyage or for any longer period, as the case may be. A difficulty however arises when, as is frequently the case, a person buys a master's interest, and relies not upon a definite contract, but upon usage to supply the terms of the contract. Thus in *Ward v. Ruckman*, 36 N. Y. 26, which was an action to recover damages for depriving the plaintiff of the right to go as master, it appeared that the defendant was the owner of three fourths of a schooner, and applied to the plaintiff to go as master. The plaintiff refused unless he could have a master's interest, and with the consent of the defendant bought one quarter of the vessel from the former master, paying him twenty-five hundred dollars, the vessel being valued at ten thousand dollars. Evidence was offered that a master's interest is more valuable than that of another person. No evidence is reported in regard to the length of time a person holding such an interest is entitled to go as master. The court held first that it did not appear that the plaintiff had any such interest as he claimed, and

possessed, could have at law only his claim for damages, and if

secondly, that no such right could by law attach to any particular share. Reliance was placed on the case of *Card v. Hope*, 2 B. & C. 661. This case, however, is hardly an authority to the extent supposed by the Court in *Ward v. Ruckman*. In *Blachford v. Preston*, 8 T. R. 89, it was held that a sale by the owner of the command of a ship employed in the East India Company's service, without the knowledge of the company, was illegal. All the parties to the suit had made an agreement with the East India Company, prior to the one in suit, by which it was agreed that no place or office in the ship should be sold. The case was decided on the following grounds, as stated by Lord *Kenyon*, C. J., "Public policy requires that there should be no money consideration for the appointment to an office in which the public are interested; the public will be better served by having persons best qualified to fill offices appointed to them; but if money may be given to those who appoint, it may be a temptation to them to appoint improper persons. The East India Company is a limb of the government of the country; and on the ground that this contract was a fraud on the East India Company, from which much mischief to the public may ensue, I am of opinion that it cannot be made the basis of an action."

In *Card v. Hope*, 2 B. & C. 661, the facts were these. The plaintiffs were owners of nine sixteenths of a ship then under a charter to the East India Company for six voyages, two of which had been performed. The defendant bought of the plaintiffs five sixteenth shares of the vessel. The contract provided that the defendant should go as master; that the plaintiffs and the survivors of them should act as ship's husbands; that if the defendant should die while in command, the plaintiffs should appoint a successor upon such terms as might be approved of by defendant's executors; that if defendant wished to sell his shares, he could do so, the purchaser to assume his obligations and to be entitled to his rights. The breaches assigned were that the defendant did not allow the plaintiffs to continue ship's husbands, but removed and displaced them, and that the defendant did not employ the plaintiffs as his agents in the concerns of the ship. The defendant pleaded the bankruptcy of one of the plaintiffs, and alleged that by reason thereof the plaintiffs became and were incapable and unable to attend to and conduct the concerns of the ship as ship's husbands. There was also another plea, alleging that by reason of the bankruptcy the defendant was discharged from the covenants. The case was argued on demurrer to these pleas, and "in the course of the argument it was suggested by the court that the deed itself might be void, on the ground that one of the main objects of it was a bargain for the appointment of a particular individual to the command of a ship which was then chartered for several successive voyages, and they directed a second argument upon this point." The defendant relied upon the case of *Blachford v. Preston*, *supra*. The contract was held to be void, as being contrary to the interest of the charterers and of the other owners. *Abbott*, C. J., said: "It is part of our national policy to give every encouragement to the equipment and employment of ships. Upon this consideration, the law enables a majority of the part-owners (under guards, indeed, to the interest of the minority peculiar to itself) to employ their ship even against the will of the minority, that the ship may not

he were removed for good cause, they would of course be only nominal.<sup>1</sup>

It is said that a part-owner of a ship, if the other part-owners are absent, and have not prohibited his action, has an implied authority to represent them in the management of the vessel, and that they will therefore be bound by his acts and contracts. Something of this is perhaps true of all cotenants of chattels; and it may possibly be carried further in the case of ships, from the nature of the property; but there must be a limit to this rule, for certainly absent part-owners would not be bound by any act of a part-owner, which was in itself or by force of circumstances so utterly and obviously unreasonable or prejudicial, that no one could rationally believe that they had authorized the act. Indeed, a consideration of the cases, and especially the latest, would lead to some doubt, whether a part-owner of a ship, as such, that is, when not authorized by being master or ship's husband or otherwise, has any more power to bind his copart-owners, than the cotenant of any other chattel has.<sup>2</sup>

remain unemployed. A power of employment vested in the majority seems to impart a power of appointing officers, and in practice the majority certainly exercise that power. But such power carries with it a duty, — the duty of exercising a free and impartial judgment in the choice of every person who is to be entrusted with the management of the outfit, and with the navigation of the ship, *ut dentur digniori*. And any contract which is calculated to have the effect of fettering the judgment and of binding the party to concur in the nomination of particular persons, at the peril of an action, is a violation of that duty." The utmost that it can properly be claimed that this case decides, is that when a ship is under a charter party, or when there are several part-owners, the owner of the major interest cannot sell this interest and reserve to himself the rights which by law belong to that interest. By the 14th article of the Laws of the Hanse Towns, "the owners, having lawful cause, may turn off a master, paying him for what share he has in the ship at the price it cost him."

In *The Windsor Castle*, 1 Notes of Cases, 118, which was a petition to displace the master, it appeared that the original owner sold to the petitioners, and that the master had recognized them as owners; that the master refused to give up the ship because he had not been released from his liabilities to shippers and others, and had not received payment of the moneys due him. He alleged that the sale to the petitioners was fraudulent. Held, that he could not dispute the validity of the sale; and that he had no lien on the vessel for what was due him.

<sup>1</sup> *Montgomery v. Wharton*, 2 Pet. Adm. 397, Bee, 388, 1 Dall. 49.

<sup>2</sup> It is said in *Abbott on Shipping*, 105, "With regard to the repairs of a ship and other necessities for the employment of it, one part-owner may, by ordering



It seems that a part-owner of a whale ship who is employed by the other owners to fit her for sea and purchase the necessary

these things on credit, render his companions liable to be sued for the price of them, *unless their liability be expressly provided against.*" In support of this proposition several cases are cited, but it will be found on examination that they are either cases of partnership, or those in which the repairs were ordered by a person who was also the ship's husband or the master. The question, whether one part-owner is liable for repairs ordered by another who is not the ship's husband, has seldom arisen, though there are numerous dicta on the subject. In *Ex parte Bland*, 2 Rose, 91, 93, and in *Stewart v. Hall*, 2 Dow, 29, the repairs were ordered by the master. In *Beckham v. Knight*, 5 Scott, 619, and in *Patterson v. Chalmers*, 7 B. Mon. 595, the parties were partners, and not part-owners merely. In the following cases the repairs were ordered by the ship's husband, and the other part-owners were held liable. *Chapman v. Durant*, 10 Mass. 47; *Schemerhorn v. Loines*, 7 Johns. 311; *Muldon v. Whitlock*, 1 Cow. 290; *Thompson v. Finden*, 4 Car. & P. 158. In *Carlisle v. The Steamer Eudora*, 5 La. Ann. 15, the action was brought by a pilot against the steamer and owners. The plaintiff was employed by one owner, who represented the vessel by a written contract. There was parol evidence that at the time of entering into the contract the plaintiff contemplated the liability of all. Both owners were held liable. See also *Hardy v. Sproule*, 29 Maine, 258.

This question has been recently the subject of much discussion in England, in the case of *Brodie v. Howard*, 17 C. B. 109, 33 Eng. L. & Eq. 146. The action was brought for work done, and for goods bargained and sold. The vessel was owned by two part-owners, one of whom appears to have been in possession, though not the ship's husband, and the repairs were ordered by him. The action was brought against the other owner, who, prior to the repairs being made, told his co-owner that he would not repair, and on finding that the repairs were actually in progress, gave the plaintiff express notice that he would not be liable. It was held, that the plaintiff could not recover. It might seem that the fact of notice having been given to the plaintiff might be an element in the case which influenced the decision, but it is evident that if the copart-owner had authority to order the repairs, a subsequent countermand could not affect the vested rights of the parties, and indeed this point is not noticed by the court, who put their opinion on the broad ground that one part-owner has no authority to bind his co-owners. Mr. Justice *Williams* states the law as follows: "Part-owners of a ship are not in the situation of partners. To this extent they resemble partners, that they are all liable for repairs and such other necessary expenses for the ship which may be presumed to have been incurred with their assent; but they differ from partners in this respect, that the authority of one part-owner to pledge the credit of the others does not exist, as in the case of partners, unless such authority has been determined only by express dissent, communicated to third parties. There is no authority that any such law is applicable to part-owners." And *Jervis*, C. J., in the same case says: "The only matter of difficulty which I have felt is the authority of Lord Tenterden" (cited in the

supplies for her voyage, cannot bind the other owners by accepting in their names a negotiable bill of exchange drawn in payment for such supplies.<sup>1</sup>

It has been held, that if a part-owner expressly dissents from the employment of a ship on a certain voyage, and the ship is lost, he is not liable, in equity, for his share of the loss; but if he objects, and nevertheless does not expressly dissent, he is so liable.<sup>2</sup>

beginning of this note), "from which it would seem that something must be expressly done by a part-owner to limit his liability. I think, however, that means this, — that, when a ship goes into dock to be repaired, where the part-owner has previously allowed his credit to be pledged, or has held himself out as liable, he must give express notice in order to determine the authority; but where there has been no such credit, or holding out as liable, no such notice is necessary. The explanation of it is this, that the authority once given continues, unless notice of the contrary has been given." So in *Revens v. Lewis*, 2 Paine, C. C. 202, the court say: "Where one of the part-owners is the master or ship's husband, in the absence of all special agreement on the subject he is *presumed* to have authority to do everything necessary to be done for the employment of the vessel, and has of course authority to make repairs, and bind the vessel for the same; but as this is only an *implied or presumed authority*, it must, like all other implied powers, cease when it is revoked, or anything is done to rebut the presumption." But in *King v. Lowry*, 20 Barb. 532, where one part-owner assumed the control of the vessel, to the exclusion and against the will of the others, it was held that all were liable for the supplies ordered by this one in the home port, the party making the repairs not having knowledge of the differences which existed between the part-owners.

<sup>1</sup> *Taber v. Cannon*, 8 Met. 456. The point decided in this case was that the owners were not liable on a bill of exchange accepted by the agent in his own name, without any designation of agency, although the bill was drawn on the owners of the vessel.

<sup>2</sup> See *supra*, p. 94, note 4. In *Stedman v. Feidler*, 25 Barb. 605, one Hart was owner of one seventh of a steamboat. He died in 1845, and the defendant was appointed his administrator. The boat was run in 1846 without his direction, control, or interference. In February, 1847, he received his proportion of the earnings for 1846, and in 1849 he received the earnings for 1847. The boat was run by the other owners from 1847. The supplies sued for were furnished in 1851. In the spring of 1849, the defendant told the managing owner that he would have nothing to do with the running of the boat, or in paying any expense or indebtedness of her running, and would have nothing to do with the business or the concerns of said boat, or with the boat itself, except to sell his interest in her if he could. The court held that the authority of the master to act as agent for the defendant was revoked, and that the defendant was not liable. The case came before the Court of Appeals, 20 N. Y. 437, and the decision was affirmed on the sole ground that the defendant as administrator had no power to bind his intestate's estate by running a steamboat. In regard to the decision of the Supreme

If a part-owner arrests a ship and prevents a voyage, after the other owners have expended money to repair and fit her out, he has been held bound to pay his proportion of these expenses. But the repairs in this case were of a permanent nature, and such as would be beneficial to the ship after the voyage was ended, and it was also expressly found that the dissentient part-owner knew that these repairs were being made, and made no objection.<sup>1</sup>

### SECTION III.

#### OF THE LIABILITY OF PART-OWNERS FOR REPAIRS OR SUPPLIES.

In general, all the part-owners are liable *in solido* for the repairs of a ship, or for necessities actually supplied.<sup>2</sup> This rests in part upon the general principle, that one receiving and holding a benefit must pay for it; and in part upon the peculiar nature of this property, and the necessity there is for the public good, as well as for the advantage of each owner, that, wherever the ship may be, all who are interested in her should be regarded as authorizing such expenditure for repairs or supplies as she may require.<sup>3</sup> We shall see hereafter, that persons making repairs or furnishing supplies have also a lien on the ship. But they can neither have a lien on the ship, nor a personal claim against those of the part-owners who do not order them, if the repairs or supplies are wholly

Court we can only say, that it would seem that a part-owner who has made the master of a vessel his servant, either by originally appointing him, or by ratifying his appointment by participating in the profits of certain voyages, should give public notice of the revocation of the master's authority to bind him, at least to all persons who have dealt with the master, knowing him to be the agent of such part-owner.

<sup>1</sup>•Davis v. Johnston, 4 Sim. 539.

<sup>2</sup> Westerdell v. Dale, 7 T. R. 306; Chapman v. Durant, 10 Mass. 47; Schemerhorn v. Loines, 7 Johns. 311; Muldon v. Whitlock, 1 Cow. 290; Hardy v. Sproule, 29 Maine, 258; Wright v. Hunter, 1 East, 20; Baldney v. Ritchie, 1 Stark. 338; Thompson v. Finden, 4 Car. & P. 158; Macy v. DeWolf, 3 Woodb. & M. 193, 204; Gallatin v. The Pilot, 2 Wallace, C. C. 592. In Louisiana, it is held that part-owners are not liable *in solido*, except when they form a partnership. Carroll v. Waters, 9 Mart. La. 500; Kimbal v. Blanc, 20 Mart. La. 386; David v. Eloi, 4 La. 106, 108; Burke v. Clarke, 11 La. 206.

<sup>3</sup> See remarks of Parker, J., in James v. Bixby, 11 Mass. 34, 36.

and obviously unnecessary, and therefore unreasonable.<sup>1</sup> But the necessity in this case may not be a strict one. If the things furnished are in any reasonable conformity with the character of the ship, or the nature and purposes of the voyage, or if, in fact, they are such that any rational part-owner may be supposed to have desired them, it will be difficult for the absent part-owners to escape their liability.<sup>2</sup> The owners are not liable after they have sold the vessel, although neither the master nor the person furnishing the supplies knew that the vessel had been sold.<sup>3</sup>

It has been said, that a part-owner of a vessel is not liable to another for repairs made at a home port without his consent. If made against his prohibition, he would not be liable; but we should suppose his consent would generally be inferred, if the repairs were reasonable and proper, and he made no objection. A considerable distinction exists in respect to all the powers of a part-owner, a master, or a ship's husband, between the exercise of them abroad and in a home port. The reason is obvious. A ship far from its home might perish for want of aid which was delayed until all the owners could be consulted. But if at home, all who will have to pay have an unquestionable right to be consulted. It is not, however, quite certain whether the fact that the vessel is in a home port, which certainly limits these powers, goes so far as to destroy them. In other words, the question, whether one part-owner can bind another in a home port without specific authority, may be regarded as still open.<sup>4</sup>

If one who has a claim for repairs or supplies receives a part of

<sup>1</sup> Molloy, B. 2, ch. 1, § 10; *The Vibilia*, 1 Wm. Rob. 1, 10; *The Sophie*, 1 Wm. Rob. 368; *Mackintosh v. Mitcheson*, 4 Exch. 175; *The Ship Fortitude*, 3 Sumn. 228, 233; *United Ins. Co. v. Scott*, 1 Johns. 106, 111; *Pratt v. Tunno*, 2 Brev. 449; *Wainwright v. Crawford*, 3 Yeates, 131, 4 Dall. 225; *Merwin v. Shailer*, 16 Conn. 489; *Philips v. Ledley*, 1 Wash. C. C. 226; *Beldon v. Campbell*, 6 Exch. 886, 6 Eng. L. & Eq. 473; *Leddo v. Hughes*, 15 Ill. 41.

<sup>2</sup> *Webster v. Seekamp*, 4 B. & Ald. 352, and cases *supra*.

<sup>3</sup> *Hussey v. Allen*, 6 Mass. 163; *Dame v. Hadlock*, 4 Pick. 458. See cases, p. 102, n. 3. Nor are they liable for repairs before their ownership commenced. *Higgins v. Packard*, 2 Hall, 226.

<sup>4</sup> *Benson v. Thompson*, 27 Maine, 470; *Hardy v. Sproule*, 31 Maine, 71; *Sch. Wm. Thomas v. Ellis*, 4 Harring. Del. 309. In *Mitcheson v. Oliver*, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219, 236, the question arose, whether a master had authority in a home port to make repairs. The point was not decided. *Parke, B.*, stated that the court considered it an open question.

his claim from one or more of those liable *in solido*, those who thus pay a part, even if it be their share, or more than their share, are still liable for the residue. And they are thus liable, although the supplier expressly promised to discharge them in consideration of their paying as they did; for their payment alone would not be consideration enough in law to sustain the promise, even if they paid more than their shares, because they were legally bound to pay the whole.<sup>1</sup> But if they paid on request, before they were bound to pay, or otherwise in any manner beneficial to the promisor and not obligatory on them, or if they received a discharge under seal, the part-owners paying would be no further liable.<sup>2</sup> It may, however, be doubted whether, in admiralty, the presence of a seal upon the discharge would make much if any difference.

If especial credit is given to one only of several part-owners, the others are not liable; but it must be clear that this was the intention of the creditor; that is, it must be certain that he not only intended to charge one, but intended also that the other part-owners should not be charged.<sup>3</sup> If the creditor knew but one, and for that reason charged him only, that we should not deem a

<sup>1</sup> *Fitch v. Sutton*, 5 East, 230; 2 *Parsons on Contracts*, 129 *et seq.*

<sup>2</sup> *Teed v. Baring*, *Abbott on Shipping*, 116.

<sup>3</sup> *Ex parte Bland*, 2 Rose, 91; *Baldney v. Ritchie*, 1 Stark. 338; *Stewart v. Hall*, 2 Dow, 29; *Thompson v. Finden*, 4 Car. & P. 158; *Hussey v. Allen*, 6 Mass. 163; *James v. Bixby*, 11 Mass. 34; *Muldon v. Whitlock*, 1 Cow. 290; *Cox v. Reid*, 1 Car. & P. 602; *Reed v. White*, 5 Esp. 122. In *Jennings v. Griffiths*, *Ryan & Moody*, N. P. 42, the court go so far as to say: The true question is, upon whose credit was the work done. This will generally be determined by the legal ownership, but may be rebutted by proof that the defendant has parted with the beneficial ownership, and all management of the vessel. This doctrine is entirely overthrown in England. Numerous recent decisions settle the law now to be, that where repairs are ordered by one person, and another is sought to be charged, the only question is whether the party ordering was held out by the other as his agent, for if not he cannot be held. Thus *Parke, B.*, in *Mitchelson v. Oliver*, 5 Ellis & B. 419; 32 Eng. L. & Eq. 219, 232, says: "We have often said the expression, 'Upon whose credit the work was done, or the goods were supplied,' is an incorrect expression, and likely to mislead the jury; the correct mode of leaving the question to the jury is, 'who was the contracting party.'" See also *Myers v. Willis*, 17 C. B. 77, 33 Eng. L. & Eq. 204; affirmed, 18 C. B. 886, 36 Eng. L. & Eq. 350; *Brodie v. Howard*, 17 C. B. 109, 33 Eng. L. & Eq. 146; *Mackenzie v. Pooley*, 11 Exch. 638, 34 Eng. L. & Eq. 486; *Macy v. Wheeler*, 30 N. Y. 231.

sufficient discharge of the rest.<sup>1</sup> If the charge were to "ship and owners," and in any way authorized by those who were owners, they are all held, whether known or unknown;<sup>2</sup> and if

<sup>1</sup> Thomson v. Davenport, 9 B. & C. 78.

<sup>2</sup> Miln v. Spinola, 4 Hill, 177. But it is perfectly clear that the fact of credit given, of which the charge "to the ship," or to "A & B, owners of the ship Hero," or whatever the words used may be, is evidence, cannot, unless ratified or adopted by the party or parties intended, enure to charge them, if they are not otherwise liable. The only effect it can have is, on the one hand, to restrict the liability to one or more of several parties who would otherwise be answerable, by showing the intent of the creditor to look exclusively to those named, and of this it is at best but *primâ facie* evidence, and liable to be rebutted by proof that the repairs, etc., were credited to those named, because the furnisher knew of no others; and, on the other hand, where words sufficiently comprehensive are employed to embrace all those who for any reason are legally chargeable, as, "To the ship and all concerned." This is but evidence of an intent to preserve the remedy of the party entire, which the law will, generally at least, imply as well without it. In Jones v. Blum, 2 Rich. 475, supplies had been furnished for the ship by the plaintiff on a contract with one Stocker, who was the owner, but had mortgaged her to the defendants by a surrender of the old register, and taking out a new one in their names. He continued, however, in possession of her, and sailed her for his exclusive benefit until she was taken possession of by the defendants. The goods were charged in the plaintiff's books "to the Brig Hayne, master and owners." The bill was presented to Stocker, and his note for the amount taken. Upon these facts, the court were of opinion that the plaintiff had contracted with, and given credit originally and exclusively to, Stocker. That, consequently, the defendants never were liable, and that the charge in the books could not make them so.

In this connection, the case of Scottin v. Stanley, 1 Dall. 129, is worthy of attention. A vessel had been put upon the stocks, and a contract entered into with the plaintiff for the painting, by one Taylor, who subsequently interested the other defendants, Stanley and Carson, in a share of the vessel, but continued to act as ship's husband, receiving from them their share of the building and outfit. Subsequently he failed, and the plaintiff brought his action against all three. He had made his charges in his book "to ship Hannah," and showed that on the 4th of April Stanley and Carson had engaged a captain for the ship. All the items of the account, but one, were dated subsequently to this act of ownership. Taylor offered to confess judgment; on the part of the other defendants it was contended, that reference should be had to the time of the contract made, which being when Taylor was sole owner, the plaintiff could resort to him alone; that no purchase made or interest acquired afterwards, could make Stanley and Carson liable for a contract made with Taylor only, and on Taylor's sole credit, and that this case was particularly strong, it being proved that they had paid their proportions already to the ship's husband, Taylor. But *Shippen*, president, instructed the jury, that, as the work was performed after they had become owners,

the service is rendered to the ship, the fact that it is charged to one part-owner by name, might raise a presumption of intention to sell or work on his personal credit alone; but we should say that this presumption was removed by showing that no others were known, because this was, of itself, a sufficient reason, and a more probable reason for charging only one of many who are liable. For the same reason, if payment is made by the negotiable paper of one, which paper is dishonored, the others are liable.<sup>1</sup> In Maine and Massachusetts, the rule that presumes negotiable paper to be intended as absolute payment, unless the contrary be shown, might be applied in the common-law courts;<sup>2</sup> but

and appeared avowedly so, it was certainly done on their credit, and not only the ship's husband, but all the real owners at the time of the work done, were liable."

It is difficult to gather the precise ground upon which this case stands, from the report. If, as might be inferred from the language of the court, the plaintiff recovered, not upon the original undertaking, but upon an implied assumpsit for work and labor done and materials furnished, for no new undertaking or ratification of the original contract by Stanley and Carson appears, they might be liable in respect of the benefit received; the question of credit given becomes then unimportant, being a mere inference of law. On the other hand, if they were charged as principals for the act of Taylor, as their agent, some other ratification than the mere acquisition of the ownership of the vessel seems requisite to the adoption of his previous contracts by them. It is possible that the plaintiff did not originally contract upon the mere personal credit of Taylor, of which the charge "to the Ship Hannah," if not an after-thought, might raise a presumption; but this would not, that we perceive, strengthen his claim as against the actual defendants. The probability is, that there existed circumstances in the case not reported. See also, upon this point, *Henderson v. Mayhew*, 2 Gill, 393.

<sup>1</sup> *Higgins v. Packard*, 2 Hall, 547; *Muldon v. Whitlock*, 1 Cow. 290; *Schemerhorn v. Loines*, 7 Johns. 311; *King v. Lowry*, 20 Barb. 532; *Patterson v. Chalmers*, 7 B. Mon. 595. See also *Cheever v. Smith*, 15 Johns. 276; *Wyatt v. The Marquis of Hertford*, 3 East, 147.

<sup>2</sup> *Chapman v. Durant*, 10 Mass. 47; *French v. Price*, 24 Pick. 13, 20; *Wilkins v. Reed*, 6 Greenl. 220; *Descadillas v. Harris*, 8 Greenl. 298; *Newall v. Hussey*, 18 Maine, 249. See also *Thacher v. Dinsmore*, 5 Mass. 299; *Maneely v. McGee*, 6 Mass. 143; *Goodenow v. Tyler*, 7 Mass. 36; *Whitcomb v. Williams*, 4 Pick. 228; *Reed v. Upton*, 10 Pick. 522; *Watkins v. Hill*, 8 Pick. 522; *Wood v. Bodwell*, 12 Pick. 268; *Ilseley v. Jewett*, 2 Met. 168; *Butts v. Dean*, 2 Met. 76; *Curtis v. Hubbard*, 9 Met. 322, 328; *Thurston v. Blanchard*, 22 Pick. 18; *Melledge v. Boston Iron Co.* 5 Cush. 158; *Varner v. Nobleborough*, 2 Greenl. 121; *Bangor v. Warren*, 34 Maine, 324; *Fowler v. Ludwig*, 34 Maine, 455; *Shumway v. Reed*, 34 Maine, 560; *Gilmore v. Bussey*, 3 Fairf. 418; *Comstock v. Smith*, 23 Maine, 202. See also the learned opinion of Mr. Justice *Sprague*, sit-

we think it would not in the admiralty courts sitting in those districts.<sup>1</sup>

Insurers who accept an abandonment of a ship become thereby owners, and are liable as such;<sup>2</sup> but not *in solido*; for if there be many insurers, each is liable only for his proportion, unless he promises to pay more. The reason of the exception is, that the ownership is in this case cast upon them by misfortune and necessity, and, if not against their will, at least is not assumed by their free choice and voluntary action.<sup>3</sup>

ting as referee, in the case of *Page v. Hubbard*, 1 Sprague, 335. But this rule never applies to notes not *negotiable*. *Trustees, &c. v. Kendrick*, 3 Fairf. 381; *Edmond v. Caldwell*, 15 Maine, 340. In the case of *The Barge Resort v. Brooke*, 10 Mo. 531, it was held, that it was competent evidence, in a suit against a boat, on a note given by a former owner for services, to show that the note was given and accepted as the individual note of such former owner, and for this purpose the maker of the note was a competent witness. See also *Reed v. White*, 5 Esp. 122.

<sup>1</sup> See *Wallace v. Agry*, 4 Mason, 336; *The Barque Chusan*, 1 Sprague, 39, 2 Story, 455; *The Brig Nestor*, 1 Sumner, 73, 87; *Leland v. The Medora*, 2 Woodb. & M. 92; *Macy v. DeWolf*, 3 Woodb. & M. 193; *The Eastern Star*, Ware, 185; *The Kimball*, 3 Wallace, 37. See *Murray v. Lazarus*, 1 Paine, C. C. 572; *The Betsey & Rhoda*, Daveis, 112.

<sup>2</sup> *United Ins. Co. v. Robinson*, 2 Caines, 280; *United Ins. Co. v. Scott*, 1 Johns. 106; *Reade v. Com. Ins. Co.* 3 Johns. 352; *Lee v. Boardman*, 3 Mass. 238, 247; *Emerig. on Ins. ch. 17, s. 6, § 1* (Meredith's ed. p. 684); *Pothier, Contrat d'Assurance*, n. 138.

<sup>3</sup> *United Ins. Co. v. Scott*, 1 Johns. 106, 110. Mr. Justice Thompson, in this case, states the law with great accuracy. He says: "It cannot be controverted, that the underwriters upon the ship, after the abandonment and acceptance, became owners thereof, and answerable for all necessary repairs and expenses. The acceptance must, I think, have a retroactive effect, and the underwriters be deemed owners from the time the accident happened. They cannot, however, be considered joint-owners, so as to constitute them partners, or so as to make them responsible, one for the other. It certainly will not be pretended, that because they subscribed the same policy, they thereby became joint partners; they are total strangers to each other; and if being on the same policy would not constitute them partners, I cannot see why accepting the abandonment should make them such. If the loss happens by any of the perils insured against, the underwriters are bound to pay their subscription, whether they accept the abandonment or not; and if the acceptance constitutes them partners, they are driven to the alternative of relinquishing the subject insured, or of becoming partners, and, of course, responsible for whomsoever may be on the same policy. A doctrine leading to such consequences never can be tolerated."



## SECTION IV.

OF THE LIABILITY OF PART-OWNERS FOR THE TORTS OF THOSE WHOM  
THEY EMPLOY.

The liability of part-owners of a ship for the torts of those whom they employ, or of each other, is governed by the principles of the law of agency. There may be something in the peculiar nature of this property, or in the powers and duties of those who are placed in charge of it, which, in particular cases, will, to some extent, qualify this law. But we are not aware that any questions of this kind have arisen, which this law of agency, rationally considered, has not sufficed to answer. The persons employed about the ship are the agents or servants of all the owners, and each owner is, to a certain extent, the agent and servant of the rest. Now every principal or master is liable for the torts of his servant or agent, if they were committed in the execution of the service or agency; or, in other words, if committed by the servant or agent by express order of the master, or in the discharge of the general duties belonging to such agent or servant; but not if they are the torts of one who is their agent or servant, but who, in this wrong doing, did not act as such agent or servant.<sup>1</sup> If a master or part-owner, while employed about a vessel, by a gross and faulty negligence set fire to one adjoining, or force her upon a rock or shore, or cause a collision, all the owners are answerable *in solido*; but not if the same act were done by the same persons intentionally, and without any connection with the ship or any service rendered on board of her.

To illustrate this rule, if we suppose that a part-owner who is in charge of a ship, and clearing out a stove in a ship in the night time for the benefit of the ship, throws living embers out of his own ship in such a way that they fall on board of an adjoining vessel, which is thereby burned, all the owners of the ship might, on general principles, be liable for this *in solido*. But if he took

<sup>1</sup> *Bowcher v. Noidstrom*, 1 Taunt. 568; *M'Manus v. Crickett*, 1 East, 106; *Lyons v. Martin*, 8 A. & E. 512; *Middleton v. Fowler*, 1 Salk. 282; *Jones v. Hart*, 2 Salk. 441; *Anonymous*, 1 Ld. Raym. 739; *Hazard v. Israel*, 1 Binn. 240; *Quarman v. Burnett*, 6 M. & W. 499; *McMahon v. Davidson*, 12 Minn. 357. See also cases *infra*.

these embers from the stove for the purpose of setting fire to the other vessel, and executed this purpose, this would be his own felonious act, for which he alone would be responsible.<sup>1</sup>

## SECTION V.

### OF THE LIABILITY OF PART-OWNERS TO EACH OTHER.

Part-owners are not, at common law, liable to each other for injury or loss to their common property by negligence. The reason given is, that each cotenant may protect himself, and need not leave the property in the uncontrolled possession of the other, unless he choose to do so; and if he does so choose, he must take the consequences. He has, therefore, no right of action if his cotenant or part-owner loses or injures the property by his gross negligence; although he would have it, if the cotenant had wilfully destroyed the property.<sup>2</sup> But this rule is rather technical than just, and we doubt whether it would be applied in admiralty; especially as the civil law, which may be regarded as the common law of courts of admiralty, makes no such distinction.<sup>3</sup>

Where part-owners agree to fit out a vessel and load her for a voyage at their common expense and for their common profit, and one of them fails to advance his share, and then becomes bankrupt before the adventure is closed, the part-owners do not pay over to his assignees all his profit, and take their dividend on the deficit of his advances; but they have a kind of lien on the adventure, for they may first deduct from his share of the profit whatever stands charged to him on account of the expenses and disbursements, and then pay over only the balance to the assignees.

This right of deduction is said to be confined to that very adventure, and not to extend to any former or general balance or indebtedness. But this question has been much discussed, and the authorities are quite conflicting. Probably in each case the decision would be much affected by the circumstances, as they showed a general partnership, or quasi partnership, or a partnership

<sup>1</sup> See *post*, ch. 13, § 5.

<sup>2</sup> See *ante*, p. 93, note 6.

<sup>3</sup> Domat's Civil Law, by Strahan, § 1489, Cushing's ed. vol. 1, p. 584.

confined with all its rights and liabilities to that special adventure. Indeed, beside limiting the lien of part-owners of ship, as above stated, we should perhaps be justified by the best authorities in saying that part-owners have no lien *as such*; that is, none, excepting so far as they are in fact partners.<sup>1</sup>

<sup>1</sup> We have seen that part-owners of a ship may hold the same in partnership, but that such is not their necessary nor even their *primâ facie* relation to each other. The only point really decided in the much discussed case of *Doddington v. Hallet*, 1 Ves. Sen. 497, Belt's Sup. to Ves. 205, 2 Rose, 78 n, whether rightfully or wrongfully decided, was, that the connection in that instance was one of partnership. That being decided, the existence of the lien resulted from it as a necessary consequence, according to the principles common to all copartnerships. See the remarks of *Spencer, C. J.*, on this case in *Mumford v. Nicoll*, 20 Johns. 611, 633. All that later English cases have done seems to have been to contest the application of those principles to that particular case, and we apprehend that it was not intended to, and does not authorize the doctrine that part-owners of a vessel, *as such*, have any lien on the ship whatever. The contrary seems to be settled by the cases, both in England and America. *Ex parte Young*, 2 Ves. & B. 242; *Ex parte Harrison*, 2 Rose, 76; 2 Bell's Comm. Sect. 1221, § 4; *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Braden v. Gardner*, 4 Pick. 456; *Merrill v. Bartlett*, 6 Pick. 46; *Thorndike v. DeWolf*, 6 Pick. 120; *Patton v. The Sch. Randolph, Gilpin*, 457. In all the cases where the existence of the lien was recognized, the court were of opinion that there existed upon the facts a partnership between the parties for the purposes of the action. See *Smith v. De Silva, Cowp.* 469; *Holderness v. Shackles*, 8 B. & C. 612; *Mumford v. Nicoll*, 20 Johns. 611; *Hewitt v. Sturdevant*, 4 B. Mon. 458; and although in *Mumford v. Nicoll* the judges go out of their way to express an opinion favorable to the existence of such a lien, they expressly state that their decision is based upon the existence of a partnership in the case before them; hence that opinion is merely *obiter*. See also *Seabrook v. Rose*, 2 Hill's Ch. 553. Where the part-owners of a ship are engaged in a joint enterprise, this does not necessarily create a partnership in the ship which is an instrument of that enterprise.

Thus in *Holderness v. Shackles*, it is expressly stated by *Ld. Tenterden, C. J.*, that the claim of lien is not on the ship, but on the proceeds of their common adventure,—in that case, a quantity of oil, with regard to which he considered the defendants as standing in the relation of copartners to each other.

In *Mumford v. Nicoll*, the partnership was held to extend not only to the fruits of the voyage, but to the ship itself, on the ground that such was the agreement of the parties. "It is true," says *Woodworth, J.*, "the appellant and Stillwell were tenants in common, and part-owners of the ship; and if no further connection appeared, the question would be very different from the one which arises in this case. It is admitted that here the parties were partners in the cargo and voyage; is it not equally clear they were so in the vessel? *It is not the case of a vessel being chartered or earning freight eo nomine, but the vessel is to be sold, as well as the cargo*; the avails of both are to be invested in such a manner as the master

## SECTION VI.

## OF THE SHIP'S HUSBAND.

The ship's husband is the general agent of the owners in respect to the ship, and may be appointed, like other agents, by a written instrument or orally. In our statutes of Registration he is called the managing owner. His appointment may be inferred from his exercising the duties of his office with the knowledge and consent of the owners. These duties are determined mainly by usage.<sup>1</sup> They are, in general, to provide for the complete seaworthiness of the ship; to take care of her in port; to see that she has on board all necessary and proper papers; to make contracts for freight, and collect the freight and all returns.<sup>2</sup> By usage in this country

may consider most advantageous. This has been carried into effect. . . . After all this, to say that in respect to the ship the appellant and Stillwell stand as tenants in common and part-owners merely, and that the ship formed no part of the partnership property, is to my mind a proposition not founded in fact."

And further on he adds: "I consider these parties as commencing the business of a limited partnership in vessels, cargoes, and trading voyages. After having sent out one vessel and cargo, they proceed to a second, and then to a third. To say that each vessel and cargo is to be considered as being the subject of a distinct and separate partnership, rather than parts and parcel of the same transactions, does not appear to me warranted by the evidence." But in this last opinion the majority of the court did not concur.

*Spencer, C. J.*, in delivering their opinion, is, however, equally explicit. "I must not be supposed to overrule," he says, "the distinction between partners in goods and merchandise and part-owners of a ship. The former are joint-tenants, and the latter are, generally speaking, tenants in common; and one cannot sell the share of the other. But I mean to say, that part-owners of a ship may, under the facts and circumstances of this case, become partners as regards the proceeds of the ship; and if they are to be so regarded, the right of one to retain the proceeds, until he is paid what he has advanced beyond his proportion, is unquestionable."

In the case of *The Larch*, 2 Curtis, C. C. 427, it was held that a part-owner, though ship's husband, has not a lien on the share of his tenant in common for advances and disbursements. See also *Sterling v. Hanson*, 1 Cal. 478.

<sup>1</sup> 1 Bell, Comm. p. 410, 4th ed.

<sup>2</sup> These duties are thus enumerated by Mr. Bell, 1 Comm. 410, § 428 (4th ed.); id. p. 504 (5th ed.). 1. To see to the proper outfit of the vessel, in the repairs adequate to the voyage, and in the tackle and furniture necessary for a seaworthy ship. 2. To have a proper master, mate, and crew for the ship, so that in this respect it shall be seaworthy. 3. To see to the

he is entitled to a commission of two and one half per cent for purchasing the outfits and paying the bills of the vessel.<sup>1</sup> And he may charge interest on the excess of his disbursements over the amounts received by him, from the time of the occurrence of such excess.<sup>2</sup> He cannot borrow money;<sup>3</sup> nor give up the lien for freight;<sup>4</sup> nor insure, nor purchase a cargo for the owners,<sup>5</sup> without especial

due furnishing of provisions and stores, according to the necessities of the voyage.

4. To see to the regularity of all the clearances from the custom-house, and the regularity of the registry. 5. To settle the contracts, and provide for the payment of the furnishings which are requisite in the performance of those duties. 6. To enter into proper charter-parties, or engage the vessel for general freight, under the usual conditions; and to settle for freight and adjust averages with the merchant. 7. To preserve the proper certificates, surveys, and documents, in case of future disputes with insurers or freighters, and to keep regular books of the ship.

See also, on this subject, *Sims v. Brittain*, 4 B. & Ad. 375; *Owston v. Ogle*, 13 East, 538; *Benson v. Heathorn*, 1 Younge & C. Ch. 326; *Turner v. Burrows*, 8 Wend. 144, 151; *Gould v. Stanton*, 16 Conn. 12, 23. In *Benson v. Heathorn*, *supra*, it was held by the court of chancery that for one of several managing directors of a joint-stock company for the acquisition and employment of vessels to take on himself the office of ship's husband was *primâ facie* a breach of trust; as his interest in the one capacity was in conflict with the duty he owed the company in the other, and that he could not in consequence be allowed to make the usual charges against them for his services as ship's husband. But in *Smith v. Lay*, 3 Kay & J. 105, it was held that the owner of a majority of shares in a ship might constitute himself managing owner, and, in that capacity, act as broker to the ship in collecting and distributing freight, there being nothing incompatible between such services and his fiduciary character as managing owner. But the court, before allowing him a commission for these services, directed an inquiry whether, according to the custom of ship-owners or otherwise, he, being managing owner, was entitled to any, and if so, what commission.

Where there was an agreement between part-owners that one of them should have the exclusive management of the vessel as ship's husband, and that, after her return, a full account should be made out of the ship and her concerns, and the net profits, after all charges had been deducted, should be divided amongst the owners; it was held that this duty devolved upon the ship's husband, and that for not so accounting and dividing the profits an action lay against him by each of the part-owners. *Owston v. Ogle*, *supra*. So the agreement between the managing and other part-owners will be enforced in chancery. *Darby v. Baines*, 9 Hare, 369, 12 Eng. L. & Eq. 238.

<sup>1</sup> *Rennell v. Kimball*, 5 Allen, 356.

<sup>2</sup> *Ibid*.

<sup>3</sup> 1 Bell, Comm. 411 (4th ed.).

<sup>4</sup> 1 Bell, Comm. 411 (4th ed.).

<sup>5</sup> *Hewett v. Buck*, 17 Maine, 147.

authority;<sup>1</sup> but if he makes such insurance, the parties for whose benefit this insurance is made may ratify his action for their own benefit; and it is said that they may do this even after a loss.<sup>2</sup> A ship's husband cannot delegate his authority;<sup>3</sup> and it is said that he cannot commence and prosecute an action at law, and bind the owners to the expenses.<sup>4</sup>

An agent of a whaling ship who is authorized to fit the vessel for sea and purchase supplies, cannot, it would seem, bind the owners by accepting a bill of exchange in their names, for such supplies.<sup>5</sup> But if he has general authority to act for the vessel and to settle with the seamen, he may bind the other owners by a promise to pay the amount of a seaman's wages, with his consent, to one of the creditors, who has attached the same on trustee process, and special authority need not be shown.<sup>6</sup>

<sup>1</sup> *Ogle v. Wrangham*, *coram Kenyon*, C. J., Guildhall Sitting, H. T. 1790, Abbott on Shipp. 107; *French v. Backhouse*, 5 Burr. 2727; *Bell v. Humphries*, 2 Stark. 345; *Robinson v. Gleadow*, 2 Bing. N. C. 156; *Turner v. Burrows*, 5 Wend. 541, 8 Wend. 144; *Patterson v. Chalmers*, 7 B. Mon. 595; *Foster v. U. S. Ins. Co.* 11 Pick. 85. And therefore, where he has insured in the name of, and for the benefit of the part-owners, he cannot recover from them the amount of the premium he has paid. *Cases supra*.

<sup>2</sup> *Hagedorn v. Oliverson*, 2 M. & S. 485; *Routh v. Thompson*, 13 East, 274. But one partner of a firm which owns a vessel may effect insurance for all. *Hooper v. Lusby*, 4 Camp. 66.

<sup>3</sup> Mr. Bell, in treating of the limitations of the powers of a ship's husband, says: "1. That, without special powers, he cannot borrow money generally for the use of the ship; though he may settle the accounts of the creditors for furnishings, or grant bills for them, which will form debts against the concern, whether he has funds in his hands or not, with which he might have paid them. 2. That, although he may, in the general case, levy the freight, which is, by the bill of lading, payable on the delivery of the goods, it would seem that he will not have power to take bills for the freight and give up the possession and lien over the cargo, unless it has been so settled by charter-party, or unless he has special authority to give such indulgence. 3. That, under general authority as ship's husband, he has no power to insure, or to bind the owners for premiums; this requiring a special authority. 4. That, as the power of the master to enter into contracts of affreightment is superseded in the port of the owners, so is it by the presence of the ship's husband, or the knowledge of the contracting parties, that a ship's husband has been appointed." 1 Bell, Comm. 411, § 429 (4th ed.); 1 Bell, Comm. 504, 505 (5th ed.).

<sup>4</sup> *Campbell v. Stein*, 6 Dow, 116, 135.

<sup>5</sup> *Taber v. Cannon*, 8 Met. 456.

<sup>6</sup> *Munroe v. Holmes*, 5 Allen, 201.

If a part-owner, who is also ship's husband, advances the share in the outfit of another part-owner, he may sue that part-owner; but has no lien on the ship therefor.<sup>1</sup>

The ship's husband being the general agent of the other owners, binds his principals, while acting within his authority; but a creditor may waive their liability, and trust to him alone; and he will be estopped from denying this, and setting up a claim against the other owners, if he has dealt with the agent in such a way as to justify the principals in believing that he dealt with the agent on his personal credit only, and therefore has permitted them to settle their accounts with their agent in such a way as to be damnified, if made responsible to the creditor.<sup>2</sup>

If one who is not a part-owner acts as ship's husband, then he is the common agent of all the owners, and all the owners are responsible to him *in solido* for his just charges, on the general principles of agency. If he be a part-owner, each is liable for his share.<sup>3</sup> But in the absence of a special agreement or usage, one part-owner, who has contributed with the others to the outfit of the vessel for a whaling voyage, is not liable, while the adventure is unfinished, to an action for his proportion of the amount of a bill of exchange drawn by the master in a foreign port upon the managing owner, and paid by him, for supplies furnished the vessel, the transaction being considered as in the nature of a partnership.<sup>4</sup> And we should say, that, if one or more became bankrupt, each of the solvent owners would be held, in equity and in admiralty, to make good his share of the insolvent's deficit, the ship's husband himself sustaining his own share of the loss by the bankruptcy and no more; agreeably to the rule of equity in cases of contribution. This liability does not extend to debts incurred prior to the time of the purchaser's acquiring an interest in the vessel, although the vessel is at the time enjoying the benefits of them.<sup>5</sup>

<sup>1</sup> Helme v. Smith, 7 Bing. 709.

<sup>2</sup> Thompson v. Finden, 4 Car. & P. 158; Muldon v. Whitlock, 1 Cow. 290; Reed v. White, 5 Esp. 122. See also Wyatt v. Marquis of Hertford, 3 East, 147; Cheever v. Smith, 15 Johns. 276.

<sup>3</sup> Helme v. Smith, 7 Bing. 709. See also Brown v. Tapscott, 6 M. & W. 119.

<sup>4</sup> Starbuck v. Shaw, 10 Gray, 492.

<sup>5</sup> Rennell v. Kimball, 5 Allen, 356. In an action between a purchaser and the ship's husband, it was sought to make the former liable for his proportion of a

As to the lien of the ship's husband, it may not be quite certain. If a partner, then he has the lien of a partner; if not, he may have a lien on the proceeds of a voyage, or of the ship itself if sold, or on her documents, provided any of these have come into his actual possession. And this lien covers all his actual expenses and disbursements for the ship, and his indemnity for any obligation incurred for the ship. But it is doubtful whether the mere office of ship's husband gives him any lien.<sup>1</sup>

If the sum for which a part-owner is liable for outfits, has been, with the consent of all the parties, balanced upon the ship's books, by charging the same to a firm of which he was a member, the lien of the ship's agent on his share of the proceeds is discharged, and a purchaser of his interest takes it free from incumbrance.<sup>2</sup>

It is undoubtedly the duty of a ship's husband to obtain from each part-owner his share or contribution towards the payment of

broker's commission for effecting a charter of a vessel, which had been incurred some time before, on the ground that the purchaser participated in the benefits of the charter-party, but the court disallowed the item.

<sup>1</sup> It would, indeed, seem that the ship's husband *as such* cannot have any lien on the vessel, or the proceeds thereof. *The Larch*, 2 Curtis, C. C. 427; *Ex parte Young*, 2 Ves. & B. 242; *Smith v. De Silva*, Cowp. 469. In this last case, the outfit of a vessel had been conducted by De Silva, who was appointed to manage the concern as ship's husband, in pursuance of an agreement made by three others at the time of their becoming owners of the ship; and De Silva settled the accounts with them, and took from one of them, who afterwards became bankrupt, promissory notes payable at a future day for a part of his share of the expense. Lord Mansfield held, that the assignees of the bankrupt were entitled to receive his full share of the profits. The ship's husband, subsequently to this transaction, had acquired an interest in the ship by purchasing a part of the share of one of the other part-owners. (The time when he acquired that interest does not distinctly appear in the report of the case; but Lord *Tenterden*, in his remarks on this case in *Holderness v. Shackels*, states it to have been subsequent to the taking of the note.) It was held that he was entitled only to a dividend under the commission for the amount of the notes. In this case, no distinction was made between the bankrupt's share in the ship, which was sold in the course of the voyage, and his share in the profits of the adventure; but it seems now settled that on the latter the ship's husband has a lien for the expenses incurred in the outfit, &c. *Holderness v. Shackels*, 8 B. & C. 612; *Gould v. Stanton*, 16 Conn. 12, 23; *Macy v. De Wolf*, 3 Woodb. & M. 193, 210. And there seems to be no valid reason why this lien should not extend to the proceeds of the ship where her sale during, or at the end of the voyage, is contemplated and effected as a part of the adventure.

<sup>2</sup> *Mendell v. Bonney*, 5 Allen, 205.



any general charge that he has made. And if he himself advances the share or contribution of any part-owner, he may sue him for it.<sup>1</sup>

## SECTION VII.

### OF THE LIENS OF PART-OWNERS.

There is much reason, and some authority, for giving to part-owners a general lien on their common property for all their just and reasonable charges or balances of accounts against each other in relation to their common property. Indeed, there might seem to be some reason for extending such a rule to all cases of cotenancy of chattels. But there is no authority whatever for it in respect to common chattels; and in regard to cotenancy in a ship, we have no doubt that the prevailing authority of the courts, as well as the general usage of merchants, gives no such lien. In other words, part-ownership is one thing, and partnership another, whether in relation to ships or other property. These two modes of ownership may be perfectly separate and distinct; and when they are so in fact, and by the intention and understanding of the parties, both the common law and the law merchant keep them so. They may run together, absolutely, as when a ship is held as a part of the stock of a copartnership, or partially, or specially, as in the case of the joint adventures or *quasi* partnerships which we have already considered. And in these latter cases, the rules of the law of partnership, at least in courts of equity or admiralty, would be applied, so far as the merits and substantial justice of each case required their application. It has been adjudged, that, where two persons build a ship together, to be owned by them in certain proportions, and one of them advances more than his proportion, he has no lien on the ship for the balance due to him.<sup>2</sup> And elsewhere it has been expressly denied that a part-owner has a lien on the shares of other owners for his advances on account of a voyage.<sup>3</sup> The cases are in irreconcilable conflict on this sub-

<sup>1</sup> See cases *ante*, p. 113, n. 1.

<sup>2</sup> *Merrill v. Bartlett*, 6 Pick. 46. See *contra* *Pragoff v. Healep*, 1 Am. Law Reg. 747.

<sup>3</sup> *Braden v. Gardner*, 4 Pick. 456.

ject. Most of them are complicated with the question, how far part-owners may be treated as copartners.<sup>1</sup> But we should say, that, if a part-owner, or even if a ship's husband, who is not an owner, makes advances for a certain voyage, and then comes into possession of the proceeds of that voyage, he should have a lien on them for his advances, by the general principles of agency; and as between the cases which admit and those that deny that a part-owner, merely as such, has a lien on the ship for his advances, while the more numerous authorities agree that there is no such lien, we cannot but think that those who favor it, — we may name Hardwicke in England,<sup>2</sup> and Story in this country,<sup>3</sup> — find some reason for their opinion in the nature of the property and of the ownership. But no principle will go so far in reconciling the leading cases on this subject as this; a part-owner, merely *as such*, has no lien whatever; but acquires such a lien when any of the elements of partnership, or agency with bailment, upon which a lien may rest, enter into his relation with the other part-owners.

<sup>1</sup> See *Doddington v. Hallet*, 1 Ves. Sen. 497; *Ex parte Young*, 2 Ves. & B. 242; *Ex parte Harrison*, 2 Rose, 76; *Ex parte Parry*, 5 Ves. 575; *Nicoll v. Mumford*, 4 Johns. Ch. 522, reversed 20 Johns. 611, and n. 1, p. 108. This may, perhaps, be regarded as one of the instances in which the common law has refused to yield to the exigencies of the law merchant, and in which some mischief has been the result of the conflict. The argument appears to have stood thus. A copartner certainly has a lien on the common property for his charges and expenses; a cotenant of a chattel certainly has not. A part-owner of a ship is but a cotenant of a chattel, and therefore has no such lien. But when cases involving this question came before the courts, it was apparent that the principles and reasons which gave this lien to a copartner applied with more or less force to a part-owner of a ship. And while the courts usually, or, at least, for the most part, have adhered to the rule that a part-owner has no lien, they have in some instances disregarded it, and in others admitted exceptions on very narrow grounds. We cannot but think it would have been better if the whole had been conceded, and a part-owner of a ship permitted to have his lien on the ship for his expenses and charges on account of the ship. But this certainly is not the law, as settled by the authorities.

<sup>2</sup> *Doddington v. Hallet*, 1 Ves. Sen. 497.

<sup>3</sup> Story on Partnership, §§ 441, 443.

## SECTION VIII

## OF SUITS BY AND AGAINST PART-OWNERS.

The admission or acknowledgment of a partner, in relation to the business of the firm, binds all the partners.<sup>1</sup> But this rule has been held not applicable to the case of a part-owner of a ship;<sup>2</sup> although we have no doubt it would be applied, with other principles of copartnership, to cases of part-ownership, to which particular circumstances gave a character of partnership. So it has been the custom for part-owners of a ship to bring a bill against each other in equity for adjustment of accounts, in like manner as is done by partners.<sup>3</sup> Until recently in England, admiralty had no jurisdiction of matters of account between part-owners,<sup>4</sup> but jurisdiction is now given by statute.<sup>5</sup> In this country admiralty has not jurisdiction in such a case.<sup>6</sup> All part-owners should join in an action for a tort committed against all; but if they do not, no advantage can be taken of the non-joinder, except by a plea in abatement.<sup>7</sup>

<sup>1</sup> Story on Partnership, § 107.

<sup>2</sup> *Jaggers v. Binnings*, 1 Stark. 64.

<sup>3</sup> Story on Partnership, § 449; *Moffatt v. Farquharson*, 2 Brown's Ch. 338; *Good v. Blewitt*, 13 Ves. 397.

<sup>4</sup> *The Apollo*, 1 Hagg. Adm. 306, 313, per *Ld. Stowell*.

<sup>5</sup> 24 Vict. ch. 10, § 8.

<sup>6</sup> *Steamboat Orleans v. Phœbus*, 11 Pet. 175; *Grant v. Poillon*, 20 How. 162; *Kellum v. Emerson*, 2 Curtis, C. C. 79; *Minturn v. Maynard*, 17 How. 477; *Ward v. Thompson*, 22 How. 330.

<sup>7</sup> *Cabell v. Vaughan*, 1 Wms. Saund. 291, g; *Dockwray v. Dickenson*, Comb. 366; *Child v. Sands*, 1 Salk. 31; *Addison v. Overend*, 6 T. R. 766; *Sedgworth v. Overend*, 7 T. R. 279; *Barnardiston v. Chapman*, cited 4 East, 122; *Wheelwright v. Depeyster*, 1 Johns. 472; *Hart v. Fitzgerald*, 2 Mass. 509; *Thompson v. Hoskins*, 11 Mass. 419; *Patten v. Gurney*, 17 Mass. 182.

In *Addison v. Overend*, *supra*, *Ld. Kenyon* held that it made no difference in this respect, that the defect appeared on the plaintiff's declaration. The succeeding case of *Sedgworth v. Overend* was an action brought by the remaining part-owner, who had not joined in the first action against the same defendant for the injury to his share in the ship. The non-joinder was now pleaded in abatement, to which the former recovery was answered, and upon demurrer the court were of opinion that the plea was bad. *Laurence, J.*, remarking: "The defendants, not having pleaded in abatement in the first action, cannot now make this objection; by omitting to plead in abatement then, they assented to the severance of the actions. There might have been greater weight in this objection, if

If, however, the action is for freight, or on any contract, the defendant may show the non-joinder in evidence under the general issue.<sup>1</sup> But part-owners of a ship may be sued separately on separate covenants.<sup>2</sup>

there had been several remaining owners, and only one of them had sued; but here the whole remaining interest in the ship is vested in this plaintiff; however, if there had been several remaining part-owners, I do not think the defendants could ever have objected to the severance of the actions after they had omitted to plead in abatement in the first action." In *Phillips v. Claggett*, 10 M. & W. 102, the declaration contained ten counts. The first five were in trover; the rest set forth that the plaintiffs having employed the defendant at his request, for reward, as agent or factor, to receive and take into his possession certain goods belonging to the plaintiffs, the defendant misconducted himself after the receipt thereof, in and about the care and disposal of the same, and by reason of such misconduct they became and were wholly lost to the plaintiffs. The defendant pleaded in abatement to the whole declaration, that the goods therein mentioned were not the property of the plaintiffs only, but were the joint property of the plaintiffs and two other persons. On demurrer the court ordered a judgment of *respondeat ouster*, on the ground that the plea was no answer, except to the first five counts, and that, being bad as to part, it was bad as to the whole.

<sup>1</sup> In *Stanley v. Ayles*, 3 Keb. 444, *Hale, C. J.*, was of opinion that *indebitatus assumpsit* by one joint-owner of a ship for his share of the freight was joint or several at the plaintiff's election, and that evidence of the custom of merchants to bring it alone was sufficient. It seems, however, well settled, that, where the contract is joint, either by agreement or implication, as where the part-owners are general partners or *quasi* partners in the particular adventure, they must sue together. "The necessity of all the part-owners joining as plaintiffs in the suit in this case," says *Abbott*, in his treatise on Shipping, p. 115, "is founded upon the consideration, that all of them are partners with respect to the concerns of the ship." Perhaps it is more accurate to say that the part-owners are all parties to the contract, which relates to the use of the property which they hold as tenants in common. And if they do not, it need not be pleaded in abatement, but may be shown under the general issue. *Hart v. Fitzgerald*, 2 Mass. 509; *Austin v. Walsh*, 2 Mass. 401; *Peters v. Davis*, 7 Mass. 257; *Baker v. Jewell*, 6 Mass. 460; *Robinson v. Cushing*, 2 Fairf. 480.

In *Baker v. Jewell*, *supra*, the court were of opinion that the want of proper plaintiffs in actions of contract is an exception to the merits, and is to be taken advantage of either upon demurrer, in bar, or on the general issue, but not in abatement. The other cases seem, however, to consider that it may be so pleaded. In *replevin*, all must join, and if they do not, the court will abate the writ *ex officio*. *Hart v. Fitzgerald*, *supra*.

<sup>2</sup> *Servante v. James*, 10 B. & C. 410, where the part-owners of a vessel agreed to load and despatch her on a voyage, the loss or profits arising from which were to be shared in proportion to the lading they respectively put on board, it was held, that a third person, who promised expressly to pay to each his share, could

If an action is brought against part-owners of a ship on a contract, and all are not joined, if the defendants do not avail themselves of the non-joinder by a plea in abatement, they cannot afterwards.<sup>1</sup> It is now well settled, that an action of tort can be maintained against one or more part-owners, as well as against all.<sup>2</sup>

not object to an action by some of them, that they were partners. *Bunn v. Morris*, 3 Caines, 54.

<sup>1</sup> "Formerly, indeed," remarked *Ld. Kenyon*, in *Addison v. Overend*, 6 T. R. 766, 770, "especially in cases of contract, it was held, that, if it appeared at the trial that there was a joint contract, and only one of the contracting parties was sued, it was a decisive objection against the plaintiff's action. But afterwards, for the convenience of the suitors, on considering the principles on which those decisions proceeded, it was held that if a defendant meant to avail himself of such an objection, he must plead in abatement." See also *Boson v. Sandford*, 2 Show. 478, 2 Salk. 440, 3 Mod. 321; *Govett v. Radnidge*, 3 East, 62; *Rice v. Shute*, 5 Burr. 2611; *Abbot v. Smith*, 2 W. Bl. 947; *Marquand v. Webb*, 16 Johns. 89; *Hathaway v. Russell*, 16 Mass. 473; *Converse v. Symmes*, 10 Mass. 377; *Bowen v. Stoddard*, 10 Met. 375; *Robertson v. Smith*, 18 Johns. 459; *Ziele v. Campbell*, 2 Johns. Cas. 382.

But where to a declaration in *assumpsit*, alleging that the defendants A and B, being owners of one fourth part of a certain vessel, and that C, D, etc., being owners of the other three fourth parts, the several owners individually, in their several proportions, and the defendants jointly, in their said proportion, promised the plaintiff to pay him for certain repairs of the vessel by him performed; and averring that the other owners had paid, but that the defendants had not paid, the defendants pleaded in abatement that it appeared by the plaintiff's own showing, that there were other persons liable who ought to have been joined, and subsequently, from a judgment of *respondeat ouster*, appealed, the judgment was affirmed. *Barstow v. Fossett*, 11 Mass. 250.

<sup>2</sup> One part-owner cannot, therefore, plead in abatement that there are others who should be joined with him. An exception to this is where land is held in common, and the title is put in controversy by the suit. 1 Chitty on Plead. 75; *Mitchell v. Tarbutt*, 5 T. R. 649; *Low v. Mumford*, 14 Johns. 426; *Patten v. Gurney*, 17 Mass. 182.

But where the declaration assumes the form of an action *ex delicto*, alleging a breach of duty and not a breach of contract, the question has arisen, and has been the subject of much discussion in England, whether one part-owner who is sued alone can plead in abatement that there are others who should have been joined with him. The question being, whether the tort or breach of the duty resulting from the contract is to be considered as the gist of the action, instead of the contract itself. It was held in *Govett v. Radnidge*, 3 East, 62, that the plea was not available. This was in the Court of King's Bench. Subsequently, the court of common pleas decided the opposite way. *Powell v. Layton*, 5 B. & P. 365; and in another case, that a plaintiff who failed to prove all the defendants to be part-

If an action, which should be brought against all the part-owners of a ship, is brought against some only, and they satisfy the judgment recovered, they will have an action for contribution against those who do not pay. If persons are joined who did not contract, or were not contracted with, this misjoinder may be shown, either by defendants or plaintiffs, on the general issue, and it is a fatal variance.<sup>1</sup>

In fourteen of our Western and Southern States, actions may be brought against vessels by name. They are Georgia, Florida, Alabama, Arkansas, Kentucky, Ohio, Michigan, Indiana, Illinois, Missouri, Mississippi, Iowa, Wisconsin, California.<sup>2</sup> But in these

owners could not recover at all. *Max v. Roberts*, 5 B. & P. 454. This case was afterwards argued in the King's Bench and in the Exchequer Chamber before all the judges. It is stated by the reporter that a difference of opinion was understood to prevail among them upon this question. The case, however, went off on a collateral point. *Max v. Roberts*, 12 East, 89. In the subsequent case of *Weall v. King*, 12 East, 452, the plaintiff declared in case, alleging a deceit to have been effected upon him by means of a warranty made by two defendants upon a *joint sale* to him by both of sheep, their joint property, it was held that the plaintiff could not recover upon proof of a contract of sale and warranty by one only, as of his separate property, as the action, although laid in tort, was founded on the joint contract alleged. See also *Lealie v. Wilson*, 3 Brod. & B. 171; *Bretherton v. Wood*, 3 Brod. & B. 54. In *Pozzi v. Shipton*, 8 A. & E. 963, the court say: "We purposely abstain from giving any opinion, whether the doctrine in *Govett v. Radnidge*, or that in *Powell v. Layton*, be the true doctrine, as we do not feel ourselves called upon to decide between them, supposing them to differ." In Connecticut, declarations in the form of tort, stating the injury to have been effected by breach of a contract, have been sustained. *Stoyel v. Westcott*, 2 Day, 418; *Bulkley v. Storer*, 2 Day, 531.

<sup>1</sup> *Spalding v. Mure*, 6 T. R. 363; *Tom v. Goodrich*, 2 Johns. 213; *Livingston v. Tremper*, 11 Johns. 101; *Jordan v. Wilkins*, 2 Wash. C. C. 482.

<sup>2</sup> Georgia. — Act of Dec. 11, 1851, Hotchkiss, Stat. Law, 625. See *Robinson v. Steamer Lotus*, 1 Kelly, 317; *Butts v. Cuthbertson*, 6 Ga. 159; *Adkins v. Baker*, 7 Ga. 56.

Florida. — Stat. of 1847, Thomps. Dig. 414. See *Flint River Steamboat Co. v. Roberts*, 2 Florida, 102.

Alabama. — Act of 1836, Clay's Dig. 139. See *Steamboat Robert Morris v. Williamson*, 6 Ala. 50; *George v. Skeates*, 19 Ala. 738; *Otis v. Thorn*, 18 Ala. 395.

Arkansas. — Rev. Stat. ch. 14. In a suit by attachment against a boat, the plaintiff should declare on the contract as having been made by the party making it, as the case may be, and not as made by the boat, but the attachment must run against the boat by name or description. *Holeman v. Steamboat P. H. White*, 6 Eng. 237. See also *Steamboat Napoleon v. Etter*, 1 Eng. 103; *Steamboat P. H. White v. Levy*, 5 Eng. 411.

States it seems that actions of this sort will not be sustained under their statutes, if the cause of action arose out of the States.<sup>1</sup>

Kentucky. — Act of 1839, 3 Stat. Law, 112; Act of 1841, 3 Stat. Law, 113. See *Strother v. Lovejoy*, 8 B. Mon. 135.

Ohio. — Stat. Swan's ed. ch. 26, p. 185; Curwen's Stat. in Force, 503. This statute has been held to be constitutional. *Keating v. Spink*, 3 Ohio State, 105. It substitutes the boat for the owner, and authorizes suit against it by name for all money demands against the owner arising from debts contracted on account of, or for the use of the boat, or for injuries resulting to passengers or property by the boat, or from misconduct of officers and crew. *The Ocean v. Marshall*, 11 Ohio State, 379; *The Ohio v. Stunt*, 10 Ohio State, 582; *The Monarch v. Potter*, 7 Ohio State, 457; *The Monarch v. Marine Railway Co.* 7 Ohio State, 478; *Canal Boat Huron v. Simmons*, 11 Ohio, 458. In a suit against a boat, however, the controversy is really and practically between the plaintiff and the owners, and the provisions of the code applicable to parties in other suits apply. *Young v. Steamboat Virginia*, 1 Handy, 156. It only establishes the liability of the craft, but gives no lien prior to its seizure. *Scott v. The Plymouth*, 1 Newb. Adm. 56; *Wick v. The Samuel Strong*, 1 Newb. Adm. 188. Therefore claims against the vessel are to be satisfied in the order of actual seizure by warrant. *Jones v. Steamboat Commerce*, 14 Ohio, 408. In this case, and in that of *Steamboat Waverly v. Clements*, 14 Ohio, 28, it was held that a purchaser of a craft with notice of a debt or liability created or incurred on account of it by the original owner, takes it subject to such debt, but that a judicial sale vests the title in the

<sup>1</sup> Ohio, — *Steamboat Champion v. Jantzen*, 16 Ohio, 91; *Goodsill v. Brig St. Louis*, 16 Ohio, 178; Missouri, — *Steamboat Raritan v. Pollard*, 10 Mo. 583; *Steamboat Time v. Parmlee*, 10 Mo. 586; *Noble v. Steamboat St. Anthony*, 12 Mo. 261; *Twitchell v. Steamboat Missouri*, 12 Mo. 412; *Fisk v. Steamboat Forest City*, 18 Mo. 587; *James v. Steamboat Pawnee*, 19 Mo. 517. In *Swearington v. Steamboat Lynx*, 13 Mo. 519, it was held that the Mississippi River, from the northern to the southern boundary of the State of Missouri, is one of the waters of the State referred to in the statute, and that the Missouri courts have jurisdiction over a tort committed on the river, though it be on the Illinois side. In Illinois, the statute has no extra-territorial jurisdiction. *Frink v. King*, 3 Scam. 144. So in Michigan. *Bidwell v. Whitaker*, 1 Mich. 469; *Turner v. Lewis*, 2 Mich. 350. And in Iowa, *Steamboat Kentucky v. Brooks*, 1 Greene, 398. The law is the same in Kentucky. *Strother v. Lovejoy*, 8 B. Mon. 135. In Ohio, in 1848, a supplementary act was passed, declaring that a wrong construction had been placed upon the statute by the court, and declaring that the courts should have jurisdiction in suits then pending as well as in future suits, notwithstanding the boat was out of the jurisdiction of the State at the time the tort was committed or the supplies furnished. The court, however, in a subsequent case, held that this act, so far as it provided for cases then pending, was unconstitutional and void, because those cases arose under a statute which it was the province of the court, and not of the legislature, to interpret. *The Sch. Aurora Borealis v. Dobbie*, 17 Ohio, 125. For a learned exposition of the various provisions and objects of the statutes of the different States upon this subject, see *Merrick v. Avery*, 14 Ark. 370.

The question of the right of State courts to exercise jurisdiction purchaser free from all liability to be again proceeded against under the statute for a claim existing at the time of the sale. It was decided in *Kellogg v. Brennan*, 14 Ohio, 72, that a mortgagee of a craft has not a lien to be preferred to the claims of creditors, especially if the vessel is running for the joint interest of owners and mortgagees. So also in *Provost v. Wilcox*, 17 Ohio, 359. An action does not lie against the boat for money loaned; nor for breach of an executory contract for the transportation of goods where the goods are not delivered to the vessel, and where, therefore, the obligations of a carrier have not arisen. *Dewitt v. Schooner St. Lawrence*, 3 Ohio State, 325. The statute does not extend to a claim for salvage, but if the boat receives the property saved, and promises to pay a certain sum, an action can be maintained against the boat for this. *Boyd v. Steamboat Falcon*, 1 Handy, 362. In *Lewis v. Schooner Cleveland*, 12 Ohio, 341, the statute was held to apply to the recovery of seamen's wages. See also, generally, *Wayne v. Steamboat Gen. Pike*, 16 Ohio, 421; *Steamboat Albatross v. Wayne*, 16 Ohio, 513; *Schooner Argyle v. Worthington*, 17 Ohio, 460.

Michigan. — The first statute relative to this subject was passed in 1839 (Sess. L. 1839, p. 70). This was repealed in 1846 (R. S. ch. 122). Under the statute of 1839, it is held that there is no lien until the vessel is attached. *Robinson v. Steamboat Red Jacket*, 1 Mich. 171; *Moses v. Steamboat Missouri*, 1 Mich. 507. In declaring upon a bond executed under § 13, ch. 122, R. S., it is not necessary to aver that the plaintiff made the application in writing in the manner and form required by sections 2 and 3 of said chapter. Nor is it necessary to aver that the vessel released upon the execution of the bond was, at the time of its seizure, within the jurisdiction of the court. *Truesdale v. Hazzard*, 2 Mich. 344. See also *Ward v. Wilson*, 3 Mich. 1. Where a vessel was attached at the instance of a creditor, and, notice to creditors to produce their claims published three months, and, before any order of sale, the owner of the vessel procured her discharge by giving the bond provided by statute, it was held that creditors, who failed to file their demands with the proper officer within three months after the first publication of notice, lost the benefit of the lien given them by statute. *Watkins v. Atkinson*, 2 Mich. 151.

Indiana. — Stat. 1838. Under this statute it has been held, that, where there are several liens on a boat, and the boat is sold on a judgment in a suit under the statute for one of the claims, the purchaser takes the boat discharged of the rest. *Steamboat Rover v. Stiles*, 5 Blackf. 483. See also *Southwick v. Packet Boat Clyde*, 6 Blackf. 148; *Olmstead v. McNall*, 7 Blackf. 387; *Brayton v. Freere*, 1 Smith, 35.

Illinois. — Rev. Stat. 1845, p. 71, ed. 1856, p. 107. It has been held, that, to enable the owner or consignee of a vessel to take an appeal from the judgment of a justice of the peace, he must make himself a party defendant to the suit before the justice. *Sch. Constitution v. Woodworth*, 1 Scam. 511. The master cannot proceed against the vessel *in rem* for his wages. *Chauncey v. Jackson*, 4 Gilman, 435. And in *Germain v. Steam Tug Indiana*, 11 Ill. 535, it was decided that the lien attaches the moment the liability is incurred, but it cannot be asserted to the prejudice of creditors or purchasers, unless the remedy be pursued within three months; but a party is not bound to enforce his lien till that period has elapsed,



*in rem* over matters which are within the admiralty jurisdiction of and when once acquired it remains in force, unaffected by any proceeding to enforce subsequent liens. And the sale of a vessel under a judgment on an attachment obtained by a seaman or material man does not divest any liens of a superior degree, nor any antecedent liens of the same degree. An attachment will not lie for towing a canal boat. *Merriman v. Canal Boat Col. Butts*, 15 Ill. 585.

Missouri. — R. C. 1845. The action must be commenced within six months after the cause of action has accrued, and in the county where the boat may be found at the time. If the boat does not come within the jurisdiction till after that time, the lien will be gone. *Williamson v. Steamboat Missouri*, 17 Mo. 374. Process cannot issue until a bond is filed. *Steamboat Archer v. Goldstein*, 13 Mo. 24. The attachment is dissolved by giving a bond, and after this the court cannot order the boat to be sold. *St. Louis Perpet. Ins. Co. v. Ford*, 11 Mo. 295. On an open running account, the lien continues for six months from date of last item. *Carson v. Steamboat Daniel Hillman*, 16 Mo. 256. But where the articles are furnished under a special contract, and delivered on different days, the lien attaches upon the delivery of the first. In computing the time within which the suit should be commenced, the day on which the delivery is completed should be excluded. *Steamboat Mary Blane v. Beehler*, 12 Mo. 477. It is provided by statute, that when a constable attaches goods or property he shall take possession, if they are accessible, and if not, he shall declare to the party in possession that he attaches the same in his hands, and summon such person as garnishee. It has been held, that the return of a constable on a warrant against a steamboat that he executed it by going on board the boat, and by reading the same to the clerk, finding the sheriff in charge, is sufficient to give the justice issuing the warrant jurisdiction to hear and determine the case against the boat. *Steamboat Eureka v. Noel*, 14 Mo. 513; *Parkinson v. Steamboat Robert Fulton*, 15 Mo. 258. A boat cannot be sold under an execution issued by a justice of the peace. *Markham v. Dozier*, 12 Mo. 288. In a suit against a boat before a justice, a judgment by default against the boat being rendered, and a motion to set aside the same being overruled, an appeal will lie. *Hore v. Steamboat Belle of Attakapas*, 11 Mo. 107. One of several part-owners can sue, under the statute, in the name of the boat. *Steamboat Beardstown v. Goodrich*, 16 Mo. 153. But he must give notice to all the others of his intention to sue, twenty days before the commencement of the action. *Langstaff v. Rock*, 13 Mo. 579. Whether a part-owner be mortgagee, or his right be absolute, he cannot acquire a lien on the boat for services rendered while he was owner. Nor can he sue the other part-owners without giving them the notice required by law, and he must show affirmatively that he gave them such notice. *Steamboat Raritan v. McCloy*, 10 Mo. 534. The St. Louis Court of Common Pleas has jurisdiction of actions of trespass against boats. *Holloway v. Steamboat Western Belle*, 11 Mo. 147. Under the statute an interpleader cannot be entertained. *Garrison v. McAllister*, 13 Mo. 579. The statute provides that the demand must be for services rendered on board the boat. It is sufficient if the demand be for services rendered as fireman, *Jones v. Steamboat Morrisett*, 21 Mo. 142, or as deck-hand, *Williams v. Steamboat Morrisett*, 21 Mo. 144. An action will lie against the boat by name for the non-performance of a contract made by her master, upon a trip up the river, for the transportation

the United States courts, has recently been considered by the Supreme of freight upon the return trip. *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254. A boat is not responsible for a breach of a contract of affreightment made by a person in possession as trespasser. *Steamboat Madison v. Wells*, 14 Mo. 360; *Bates v. Steamboat Madison*, 18 Mo. 99. But persons furnishing supplies are not bound to inquire whether the master or agent who has the actual possession of a vessel is legally entitled to such possession, in order to secure a lien. *Steamboat Lehigh v. Knox*, 12 Mo. 508. There is no lien upon a steamboat for the use of a private wharf boat. *Bernie v. The Steamboat Shenandoah*, 21 Mo. 18. The statute divides debts into four classes. Each class is to be preferred according to its number, the highest number being the last class. But a judicial sale of a boat under the State law to satisfy a lien of one class, conveys to the purchaser a title free from the liens of every other class, superior or inferior. *Steamboat Raritan v. Smith*, 10 Mo. 527. So, of a sale under a similar law of another State. *Finney v. Steamboat Fayette*, 10 Mo. 612. But a sale in another State, which has no such law, does not divest the lien. *Steamboat Sea-Bird v. Beehler*, 12 Mo. 569. An action does not lie against a boat for damages sustained by a deck hand in being forced on shore by the master in breach of the contract of hiring. *Blass v. Steamboat Robert Campbell*, 16 Mo. 266. If the affidavit to a complaint against a boat is made by the plaintiff's agent, it must show his means of knowing the truth of the particulars specified in the complaint. *Bridgeford v. Steamboat Elk*, 6 Mo. 356; *Hamilton v. Steamboat Iron-ton*, 19 Mo. 523. And it must appear from the demand filed that the claim gives a lien. *Luft v. Steamboat Envoy*, 19 Mo. 476. The return of the officer to the writ must state that he seized the boat, but it need not state that he retains it in his custody. *Blaisdell v. Steamboat Wm. Pope*, 19 Mo. 157. Where a boat is seized and a bond given under the 9th section of the act, the lien is discharged, and the party cannot, after the boat has been sold, present his demand for allowance against the proceeds. *Auvray v. Steamboat Pawnee*, 19 Mo. 537. Unless the boat is bonded within five days after seizure, it is the duty of the officer to apply for an order of sale, and he has no authority to hold her without bond, subject to final process in the suit. *Blaisdell v. Steam Ferry Boat Wm. Pope*, 19 Mo. 538. For other decisions under the statute, based upon general rules, see *Ready v. Steamboat Highland Mary*, 17 Mo. 461, 20 Mo. 264; *Whitmore v. Steamboat Caroline*, 20 Mo. 513; *Chouteau v. Steamboat St. Anthony*, 16 Mo. 216, 20 Mo. 519; *Dean v. Ritter*, 18 Mo. 182; *Porter v. Steamboat New England*, 17 Mo. 290; *Darby v. Steamboat Inda*, 9 Mo. 645; *Barge Resort v. Brooke*, 10 Mo. 531; *Jarbee v. Steamboat Daniel Hillman*, 19 Mo. 141; *Renshaw v. Steamboat Pawnee*, 19 Mo. 532; *Ritter v. Steamboat Jamestown*, 23 Mo. 348.

Mississippi. — Acts of 1840, 1841, Hutch. Dig. 288, art. 6; id. 290, art. 8. See *Steamboat General Worth v. Hopkins*, 30 Missis. 703.

Iowa. — Rev. Stat. 101; Code, ch. 120. See *Steamboat Kentucky v. Brooks*, 1 Greene, 398; *Ham v. Steamboat Hamburg*, 2 Clarke, 460; *West v. Barge Lady Franklin*, 2 Clarke, 522.

Wisconsin. — Rev. Stat. 116. See *Rand v. The Barge*, 4 Chand. 68.

California. — Laws of California, First Sess. p. 189, ch. 75, § 2; Compiled Laws of 1853, p. 576, ch. 6, § 318.

preme Court of the United States,<sup>1</sup> and the following decision given: that in all cases where the United States courts have jurisdiction under the act of 1789,<sup>2</sup> their jurisdiction *in rem* is exclusive, and the State courts cannot act *in rem*; but in cases under the act of 1845,<sup>3</sup> the State courts have concurrent jurisdiction with the United States courts. Under the act of 1789, the United States courts have exclusive jurisdiction on the high seas and on waters navigable from the sea, saving to suitors the right of "a common-law remedy, where the common law is competent to give it." Under the act of 1845, the jurisdiction is confined to vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and Territories, upon the lakes and navigable waters connecting said lakes, saving to the parties "the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by the State laws." A suit *in rem* is considered as not a common-law remedy, and therefore as not within the saving clause of the act of 1789. It may, however, be a remedy "given by the State laws," and consequently when so given it is within the saving clause of the act of 1845.

It should be added, as a general remark, that part-owners of a ship are bound to deal fairly by each other, and that each, in the exercise of his own powers, must respect the rights of all the rest. This would flow from the principles of justice and morality; but it would seem that public policy comes in aid of these principles, in relation to a property of which the proper use and management are so important to the public. Hence, in one interesting case, where some part-owners in a valuable ship sold their shares by an indenture between them and the purchaser, which contained covenants that, in the opinion of the court, tended to control the appointments of persons to be employed in the management and navigation of the ship, it was held that such a contract violated the rights of the other owners and also principles of public policy; and that it was therefore void.<sup>4</sup>

<sup>1</sup> The *Hine v. Trevor*, 4 Wall. 555.

<sup>2</sup> Act of 1789, ch. 20, § 9, 1 U. S. Stats. at Large, 77.

<sup>3</sup> Act of 1845, ch. 20, 5 U. S. Stats. at Large, 726.

<sup>4</sup> See *Card v. Hope*, 2 B. & C. 661, cited p. 96.

## CHAPTER V.

## OF THE LIABILITIES OF OWNERS GENERALLY.

AN owner of a ship, in possession of her and having both the legal and equitable title, is liable for all supplies furnished and all repairs made to her, and all work and service rendered for her benefit by order of the master, and in general for all the contracts made by him for the benefit of the vessel; because, from the necessity of the case, the master is invested with a very wide authority to do and provide whatever is requisite for his ship.<sup>1</sup> Cases of this kind often occur; but those which depend upon the question how far and when a *quasi* owner is liable in the same way as an actual owner, or in the stead of the actual owner, are more numerous and important. Under what circumstances, and in what cases, the charterer will be considered to be the owner *pro hac vice*, we shall consider in our chapter on charter-parties. The question in every case is, whose agent is the party ordering repairs. If of the general owners, they are liable; but if not, the charterer alone can be looked to.<sup>2</sup> And if the charterer is an infant, the general owner is

<sup>1</sup> See *ante*, p. 97, note 2, and *post*, chapter on Powers and Duties of Master.

<sup>2</sup> Thus in *Frazer v. Marsh*, 13 East, 238, the repairs were ordered by the captain, who was also the charterer. It was held, that the general owner was not liable. *Le Blanc, J.*, says: "An owner would have the appointment of the captain; but the defendant had no right to appoint the captain under the charter-party." And in *Reeve v. Davis*, 1 A. & E. 312, where a steam vessel was let by charter-party, the registered owners agreeing to keep the engine in order, but the charterer was to pay for all other repairs, it was held, that repairs ordered by the charterer, who was also the captain, except those necessary for the engines, could not be charged to the general owner, although the person making the repairs was unacquainted with the special agreement between the parties. Lord Denman, C. J., says: "The question is, Who were the contracting parties? The mere circumstance of ownership may be sufficient to create a liability where the vessel has been left under the control of a party who has given orders, if no intervening ownership has been created. But if a ship is let out to hire, I do not see how the owners are liable for work done upon it by order of the party hiring, more than the landlord who lets a house." In this country, these decisions have been repeatedly followed. *Perry v. Osborne*, 5 Pick. 422; *Urann v. Fletcher*, 1 Gray,

not therefore liable, because the contract between the owner and charterer is, in such a case, voidable only and not void.<sup>1</sup> Nor is the owner of a chartered vessel liable for wharfage.<sup>2</sup>

Most of these questions occur in reference to mortgagees. It is quite certain that a mortgagee should take possession as soon as he reasonably can; and that, if he fails to do so, unless protected by the provisions of some statute in his behalf, he is liable to have his title defeated by any third party who acquires a right to the ship in ignorance of the mortgagee's prior title, and in good faith.<sup>3</sup> If a mortgagee takes possession, and especially if he takes out a new register in his own name, or if he does any acts which can be deemed in some degree equivalent to public notice that he is owner, this actual or apparently actual possession, added to his legal title as owner, seems to confer upon him the responsibilities and liabilities of an owner.<sup>4</sup> The principal difficulty occurs when

125; *Baker v. Huckins*, 5 Gray, 596; *Thompson v. Snow*, 4 Greenl. 264; *Houston v. Darling*, 16 Maine, 413; *Webb v. Peirce*, 1 Curtis, C. C. 104, reversing s. c. 1 Sprague, 192; *Leonard v. Huntington*, 15 Johns. 298. The same principle underlies numerous other decisions relative to contracts formed by charterers with third parties. See *Reynolds v. Toppan*, 15 Mass. 370; *Taggard v. Loring*, 16 Mass. 336; *Cutler v. Winsor*, 6 Pick. 335; *Thompson v. Hamilton*, 12 Pick. 425; *Manter v. Holmes*, 10 Met. 402; *Cutler v. Thurlo*, 20 Maine, 213; *Williams v. Williams*, 23 Maine, 17; *Sproat v. Donnell*, 26 Maine, 185. — The vessel, however, is liable *in rem* for the breach of a contract of affreightment entered into by the master, provided such contract be within the scope of his authority. See *post*, Chap. VII.

<sup>1</sup> *Thompson v. Hamilton*, 12 Pick. 425.

<sup>2</sup> *Philadelphia v. Naglee*, 1 Ashm. 37.

<sup>3</sup> *Ex parte Matthews*, 2 Ves. Sen. 272; *Atkinson v. Maling*, 2 T. R. 462; *Mair v. Glennie*, 4 M. & S. 240; *Hay v. Fairbairn*, 2 B. & Ald. 193; *Portland Bank v. Stubbs*, 6 Mass. 422, 425; *Tucker v. Buffington*, 15 Mass. 477, 480; *Badlam v. Tucker*, 1 Pick. 389. See also cases *ante*, p. 83, note 1. In *The Schooner Romp*, Olcott, Adm. 196, it was held, that a person who took a mortgage of a vessel then in port, but suffered it to leave in the possession of the mortgagor, without any record on the ship's papers of the transaction, could not recover the vessel from a subsequent *bonâ fide* purchaser without notice, although he enforced his claim at the first opportunity after the vessel left, and there was an agreement between the mortgagor and mortgagee that the former should remain in possession until the mortgagee had a chance to enforce the mortgage. *D'Wolf v. Harris*, 4 Mason, 515, is doubted in this case, so far as it is an authority in opposition to the last point.

<sup>4</sup> *Miln v. Spinola*, 4 Hill, N. Y. 177. See also *Hodgson v. Butts*, 3 Cranch, 140. And so if he exercises other acts of ownership; as where his name

the question arises, whether a mortgagor in possession is liable for supplies and repairs, or a mortgagee out of possession. For if a mortgagee chooses not to take possession, he may, at his own pleasure, incur the danger of having his title defeated by a third party, without any risk of impairing it as between himself and the mortgagor. And if he takes no possession, but is equally protected against all the world, either by record or by any statutory provisions, as if he had possession, this circumstance does not clothe him with all the liabilities which spring only from actual possession. And then the question occurs, is he liable for supplies or work rendered to the vessel?

It is not unfrequently said, that this question is to be answered by ascertaining to whom the credit was given.<sup>1</sup> But this is certainly not so. The answer must be made by compounding three elements, and in their due proportion; one of them being this question of credit; another is, by whom was this credit authorized or justified; and there is still another, Who has received and holds the benefit of the service rendered? It is a principle of very wide application, that, if any person accepts and holds the benefit of any

appeared on the registry as owner, and he caused the place of his residence to be painted on the stern of the vessel. *Tucker v. Buffington*, 15 Mass. 477. But see *Myers v. Willis*, 17 C. B. 77, 33 Eng. L. & Eq. 204, affirmed, 18 C. B. 886, 36 Eng. L. & Eq. 350. And where the mortgagee has possession, and the voyage is performed for his benefit, he is liable for the wages of the master. *Dean v. McGhie*, 4 Bing. 45, 48, per *Burrough*, J.; *Fisher v. Willing*, 8 S. & R. 118, 122; *Champlin v. Butler*, 18 Johns. 169. But not where the master, with full knowledge of a secret agreement between the mortgagor and mortgagee that the latter should have no interest in the voyage, made a special agreement with the former in relation to his wages and privilege. Same case.

See also the case of *Martin v. Paxton*, reported 1 Holt on Shipping, 353. *Abbott*, C. J., there held that the mortgagees of a ship who were the registered owners were not liable to a claim for wages by a sailor, though they accrued upon a voyage which was prosecuted for their benefit, the ship's freight and earnings during the voyage being made over to them by the same deed which conveyed the ship as a security for advances, on the ground that the plaintiff had made the contract on which he sued, with the mortgagor, who was master of the vessel and remained in possession, and had given credit to him and not to the defendants.

The presumption is in favor of the mortgagee's right to take possession of the vessel. *Holmes v. Sprowl*, 31 Maine, 73. Hence the burden of proof will be upon him to show that he possessed no right of possession and control, if he rests a denial of responsibility on this ground.

<sup>1</sup> See *ante*, p. 102, note 3.

service, he cannot deny that it was rendered to him, and for his benefit. This may seem to conflict with another principle, that no man can make himself the creditor of another against that other's will or without his consent. But they are reconciled by this rule, that if the benefit be rendered, then he who may receive it may also reject it; it is wholly at his choice whether to accept and hold it or not; and if he does choose to accept and hold it, then on all grounds, both of moral and legal justice, he puts himself in the same position as if he had originally requested this service. But this rule, again, has one important qualification; for it is not applicable at all, or if at all only in a modified form, where the party to be made debtor has no such choice, because the benefit done cannot be renounced or rejected without a positive loss and detriment. Does the conferring of it in that case, and the subsequent holding of it, create a legal claim against the holder? Perhaps the precise answer should be, that the holder, who retains a benefit because he cannot reject it, — as if repairs were made to a ship, of such a kind and extent that they could not be removed without dismantling her, — should pay for it, not the whole cost, but so much as it is certainly worth to him after deducting full compensation for all the damage and inconvenience of paying for it against his will. But the law cannot well apply such nice distinctions in practice;<sup>1</sup> and the cases which hold an unconditional purchaser not in possession liable for supplies, although the furnisher had no knowledge that he was owner, or a mortgagee, who has taken possession liable although the furnisher did not know of his title or possession, may rest, either upon the ground that he holds the benefit and must therefore admit his request for it, or that his ownership confers a constructive agency and authority on the person — usually the master — who ordered the supplies or repairs. But it cannot be said, with any accuracy, that in these cases credit is given to those *persons*, even if the charge in the furnisher's books

<sup>1</sup> In *Blanchard v. Fearing*, 4 Allen, 118, supplies were furnished to a vessel upon the order of her master, some of which were for the vessel's permanent advantage. The bill of sale to the defendant was at the time recorded at the Custom House, and the supplies were furnished on his credit. It appeared in evidence that the bill of sale was intended merely as collateral security, that the defendant had not taken possession of the vessel, or received any part of her earnings, or in any way interfered with her management, or in the appointment of her master. Held that he was not liable. See *Macy v. Wheeler*, 30 N. Y. 231.

is to "the Ship Henry and her owners." And it can never be true, that the owner or mortgagee in possession is liable for repairs put in against his will, although, being put in, he lets them remain.

The question, however, recurs, What is the liability of a mortgagee out of possession? And the general answer now is, undoubtedly, that he is not liable.<sup>1</sup> The question of credit will

<sup>1</sup> With respect to mortgages of ships the same difficulty seems to have existed as with respect to mortgages of lands. But while the equitable doctrines laid down by Lord Mansfield in the great case of *Eaton v. Jaques*, 2 Dougl. 455, with respect to the true nature of the interest of a mortgagee out of possession, were subsequently overruled in Great Britain (see *Williams v. Bosanquet*, 1 Brod. & B. 238), so far as they applied to real estate, they maintained their ground successfully in the case of ships. In this country, they were generally ratified to their full extent, almost from the first.

A doubt certainly has been expressed, *vide Westerdell v. Dale*, 7 T. R. 306, 312, per Lord Kenyon, C. J.; *Tucker v. Buffington*, 15 Mass. 477; but those cases in which the mortgagee was held liable as owner, *Ex parte Machel*, 1 Rose, 477; *Starr v. Knox*, 2 Conn. 215; *Lord v. Ferguson*, 9 N. H. 380; *Henderson v. Mayhew*, 2 Gill, 393, turn entirely on the rejection of the evidence offered to show the true nature of his title, whilst they recognize the truth of the general rule, which seems now well settled, namely, that where the mortgagee has neither taken possession of, nor exercised any other act of ownership over, the vessel, he is not answerable for, nor entitled to, the benefit of the acts of the master or other agent of the ship. Thus, he is not liable for supplies and repairs furnished to her. *Jackson v. Vernon*, 1 H. Bl. 114; *Twentyman v. Hart*, 1 Stark. 366; *Annett v. Carstairs*, 3 Camp. 353; *Baker v. Buckle*, 7 J. B. Moore, 349; *Briggs v. Wilkinson*, 7 B. & C. 30; *McIntyre v. Scott*, 8 Johns. 159; *Ring v. Franklin*, 2 Hall, 1; *Birkbeck v. Tucker*, 2 Hall, 121; *Miln v. Spinola*, 4 Hill, N. Y., 177; *Heaketh v. Stevens*, 7 Barb. 488; *Brooks v. Bondsey*, 17 Pick. 441; *Winslow v. Tarbox*, 18 Maine, 132; *Cutler v. Thurlo*, 20 Maine, 213; *Colson v. Bonzey*, 6 Greenl. 474; *Lord v. Ferguson*, 9 N. H. 380; *Philips v. Ledley*, 1 Wash. C. C. 226; *Duff v. Bayard*, 4 Watts & S. 240; *Cordray v. Mordecai*, 2 Rich. 518. But where he wrote to the person furnishing supplies, "It does not belong to me to pay any bills on the vessel, but at the same time I am holden for them," he was held liable. *Oakes v. Cushing*, 24 Me. 313.

And, generally, he is not liable for the contracts or negligence of the mortgagor who is master. *Thorn v. Hicks*, 7 Cow. 697. Nor for the wages of the master and crew. *Annett v. Carstairs*, 3 Camp. 353; *Fisher v. Willing*, 8 S. & R. 118.

On the other hand, he is not entitled to the freight earned by the ship. *Chinery v. Blackburne*, 1 H. Bl. 117, n.; *Brancher v. Molyneux*, 3 Scott, N. R. 332. In *Milton v. Mosher*, 7 Met. 244, a mortgagee, on the vessel arriving in port, made a secret entry and took formal possession of the vessel, but did not give notice to any one or contribute to the expenses of the next voyage. On this voyage the owners made a second mortgage of the vessel to the plaintiffs, subject to



always be decisive where the parties have made a bargain, and credit is given according to it, for there is nothing to prevent their making what bargain they will. A furnisher of supplies may agree with the master ordering them, even if there be an absolute owner in possession, to charge them only to the master and look to nobody else; and then he has no claim beyond the master. So a mortgagee out of possession, or indeed a stranger, may order the goods or service as for himself, or may agree to pay for them if supplied to the ship, and then he will be bound to pay for them without any reference to his interest in the ship. Although an owner of a vessel may not be liable for labor and materials furnished, when credit is given exclusively to another party, yet he may be held on his oral promise to pay for them, made for a valuable consideration, such a promise not being a promise to answer for the debt of another within the statute of frauds.<sup>1</sup>

the first mortgage, and of the catchings of the vessel. Held that the plaintiffs were entitled to the catchings, and the first mortgagee was not entitled to the rights of a mortgagee in possession. See also *post*, ch. 7, § 4. In *Myers v. Willis*, 17 C. B. 77, 33 Eng. L. & Eq. 204, the ship was transferred by the owner to the defendant by an absolute bill of sale, and the transfer duly recorded. The vessel, at the time, was at sea. The transaction was not intended as a sale, but merely as a collateral security for a loan. Subsequently the master, in ignorance of what had passed, entered into a contract of affreightment with the plaintiff. This action was brought to recover damages for the breach of said contract. Held, that the plaintiff could not recover. *Jervis, C. J.*, delivering the opinion of the court, said: "I am of opinion that the defendant is entitled to judgment. It is admitted that the law is now different from what it was formerly, when it used to be considered that the register only was to be looked at, and that it alone was conclusive as to the ownership of the vessel, and conclusive, therefore, of the liability of the party appearing thereon as owner; but it is now settled that the question of liability in these cases is to be determined in the same way as in all other cases of contract, by ascertaining with whom the contract was made. That will depend, in this case, on the relation of principal and agent, — whose agent was the master? It has been admitted, that, in the case of a mortgagee of a vessel who takes merely the security of the ship, not intending to incur liability as owner, a mere entry by him into possession does not render him liable for the contracts of the master, made after the execution of the mortgage and before entry, because that alone does not prove an intention on the part of the mortgagee to adopt the master as his agent." Affirmed in Exchequer Chamber, 18 C. B. 886, 36 Eng. L. & Eq. 350. See also *Hackwood v. Lyall*, 17 C. B. 124, 33 Eng. L. & Eq. 211.

<sup>1</sup> *Fish v. Thomas*, 5 Gray, 45. It was also held, in this case, that the agreement of the promisee to forbear to enforce his claim in admiralty was a good consideration for the promise, whether he actually had a lien or not.

And this bargain, or any other, may be proved by, or inferred from, circumstances. But, on the one hand, a mortgagee who does not have the possession and control of the ship does not authorize a furnisher to consider him the owner; and if credit be given him, it does not bind him unless given with his consent. On the other hand, so long as the mortgagor retains possession and control, the ship may be regarded as being only a security for a debt which is less than its value, the mortgagor not only owning the equity of redemption, but keeping possession of the vessel, that he may, by her earnings, enable himself to pay the debt, and, by adding to, or preserving her value, add to or preserve his own interest in her if he proposes to pay the debt without her, or in the excess of her value over the debt. And therefore the mortgagee cannot be made liable on the ground of accepting and holding the benefit rendered by the supplies or repairs.

And even if a person takes a bill of sale of a vessel absolute in its terms, and is registered as owner, and the person furnishing the supplies consulted the record at the custom-house, and gave credit to him as owner, he is not liable as such, if the bill of sale was intended as collateral security, and he has never taken the vessel into his possession or control, or exercised any acts of ownership.<sup>1</sup> It should be noticed here, and will be more fully stated hereafter, that "material men" so called, that is, those who supply the materials for supplying and repairing a ship, and all who work upon her for such purposes, have, by the maritime law, a lien on the ship itself for the whole amount due them, excepting in the home port.<sup>2</sup> But this is usually enforceable only in admiralty, although some recent State statutes seem to give a similar right and remedy in the State courts. This subject will be considered hereafter.

<sup>1</sup> Howard v. Odell, 1 Allen, 85; Blanchard v. Fearing, 4 Allen, 118.

<sup>2</sup> *Ex parte* Shank, 1 Atk. 234; Buxton v. Snee, 1 Ves. Sen. 154; Watkinson v. Bernadiston, 2 P. Wms. 367; Westerdell v. Dale, 7 T. R. 306; Rich v. Coe, Cowp. 636; Justin v. Ballam, 1 Salk. 34; The Calisto, Daveis, 29, s. c. Read v. The Hull of a New Brig, 1 Story, 244; Davis v. A New Brig, Gilpin, 473; The Brig Nestor, 1 Sumn. 73; Peyroux v. Howard, 7 Pet. 324; The St. Jago de Cuba, 9 Wheat. 409; The General Smith, 4 Wheat. 438; Buddington v. Stewart, 14 Conn. 404; Davis v. Child, Daveis, 71; The Sch. Marion, 1 Story, 68; Leland v. The Ship Medora, 2 Woodb. & M. 92, 96.

## CHAPTER VI.

## OF HYPOTHECATION BY BOTTOMRY.

## SECTION I.

## OF A BOTTOMRY BOND.

IN some respects this is analogous to the mortgage of a ship, but in others it is wholly different.<sup>1</sup> The questions which arise from the bottomry of a vessel are, in this country, frequently settled in admiralty, and some of them must be so; and it is to be regretted, perhaps, that the principles of admiralty law are not always, and in all courts, applied to these questions. These principles are, partly from usage and precedent and partly from statutory provision, as we shall hereafter state more fully, those of the civil law. Our common-law mortgage, where the *property* must pass to the creditor, and it is a matter of indifference whether the *possession* remains with the debtor or accompanies the property, was, strictly speaking, unknown to the civil law. And it is quite common for our courts to speak of *pledging* a ship by *hypothecation*. But this is not accurate. It was of the essence of a pledge (*pignus*) of the civil law, that the possession of the thing pledged passed to the pledgee, and remained with him;<sup>2</sup> and this rule has been applied and recognized by courts of common law.<sup>3</sup> But in *hypothecation* the thing hypothecated might remain in the possession of the owner. The creditor might acquire neither the *property* nor the

<sup>1</sup> The contract of bottomry is so called because the keel or bottom of the ship is pledged, a part being figuratively used for the whole. The *Atlas*, 2 Hagg. Adm. 48, 53; *Scarborough v. Lyrus*, Latch, 252, Noy, 95.

<sup>2</sup> Justinian, *Inst. Lib.* 4, tit. 6, § 7; *Dig. Lib.* 13, tit. 7, l. 35; Vinnius ad *Inst. Lib.* 4, tit. 6, § 7, p. 800; Domat's *Civil Law*, by Strahan, § 1657, Cushing's ed. vol. 1, p. 648; *The Brig Nestor*, 1 Sumner, 73, 81.

<sup>3</sup> *Ryall v. Rolle*, 1 Atk. 165; *Reeves v. Capper*, 5 Bing. N. C. 136; *Homes v. Crane*, 2 Pick. 607; *Cortelyou v. Lansing*, 2 Caines Cas. 200; *Brownell v. Hawkins*, 4 Barb. 491.

*possession* of it. Thus, he had no *jus in re*, but he had a *jus ad rem*; a right or interest in or to the thing hypothecated, a *privilegium*, or, as we call it, a lien, which could be enforced for the payment of his debt.<sup>1</sup>

We consider that this rule has been expressly applied by the Supreme Court of the United States to hypothecation by bottomry.<sup>2</sup> In the case in which this was done (in 1808), the court intimate a doubt whether a bottomry bond, made by the owner in a home port, can be within the admiralty jurisdiction.<sup>3</sup> It has been repeatedly asserted, that every valid bottomry bond, wherever or however made, is wholly within that jurisdiction; but this is certain only of bottomry bonds made abroad, and perhaps should be limited to those which are made by the master to meet the necessities of the ship.<sup>4</sup> It would be very difficult for a court of common law, by any common-law process, to enforce a lien by bottomry on a ship, in any other way than by considering that the contract of bottomry gave the creditor the property or possession, or both, of

<sup>1</sup> The *Tobago*, 5 Rob. Adm. 218, 222; *Johnson v. Shippen*, 2 Ld. Raym. 982; *The Young Mechanic*, 2 Curtis, C. C. 404.

<sup>2</sup> In *Blaine v. The Charles Carter*, 4 Cranch, 328, *Chase, J.*, said: "A bottomry bond made by the master, vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her, which may be enforced, with all the expedition and efficiency of the admiralty process." See also *Johnson v. Shippen*, 2 Ld. Raym. 982; *Johnson v. Greaves*, 2 Taunt. 344; *United States v. Delaware Ins. Co.*, 4 Wash. C. C. 418.

<sup>3</sup> The same is also stated by *Abbott*, p. 153. But this opinion of the learned author is founded entirely on a dictum of *Holt, C. J.*, in *Johnson v. Shippen*, 2 Ld. Raym. 982. There is also a dictum of *Lawrence, J.*, in the case of *Busk v. Fearon*, B. R., Mich. T., 44 Geo. 3. The case is reported in 4 East, 319, but the dictum is not noticed.

<sup>4</sup> In this country, this question has been much discussed. Besides the intimation of the court in *Blaine v. The Charles Carter*, *supra*, the following cases support the view, that there is no jurisdiction in admiralty if the vessel is hypothecated by the owner in the home port. *Forbes v. Brig Hannah*, Hopk. 99, Bee, 348; *Knight v. The Attila*, Crabbe, 326, and affirmed in circuit court, but not reported; *Hurry v. Ship John & Alice*, 1 Wash. C. C. 293; *Hurry v. Hurry*, 2 Wash. C. C. 145. On the other hand, the jurisdiction has been sustained by Mr. Justice *Winchester* in *Wilmer v. The Smilax*, 2 Pet. Adm. 295, n.; by Mr. Justice *Thompson*, in the case of *The Sloop Mary*, 1 Paine, C. C. 671; and by Mr. Justice *Story*, in an elaborate judgment in the case of *The Brig Draco*, 2 Sumner, 157. See also *Selden v. Hendrickson*, 1 Brock. C. C. 396. The jurisdiction was also maintained by the court of admiralty in Ireland, *Corish v. The Murphy*, 2 Browne, Civ. & Adm. Law, Appen. 530.

the ship, subject only to defeasance on payment of the debt; and then permitting him to make it available for his security, in the same manner as if it were a pledge. But unless it were a mere pledge or mortgage of the ship, at home, there would be need of admiralty jurisdiction.

Money may be secured by a bottomry bond by the owner, in the home port, and not unfrequently is so in this country.<sup>1</sup> But originally, and, as we think, more properly, this bond was seldom made, excepting by a master in a foreign port, where money, which was necessary, could not be raised otherwise.

The statute of 1850,<sup>2</sup> which requires that mortgages of ships shall be registered at the custom-house, expressly provides that the lien by bottomry created on any vessel during her voyage by a loan of money or materials, necessary to enable such vessel to prosecute a voyage, shall not lose its priority, or be affected by the provisions of the act. And it has been decided that bottomry bonds are not within the purview of a State statute requiring record of mortgages of personal property.<sup>3</sup>

The essentials of a bottomry bond are, that it shall bind the ship for the payment of the money, provided the ship perform a certain voyage and arrive in safety; and if the ship be lost, no part of the sum borrowed is to be repaid; <sup>4</sup> and because the lender takes upon

<sup>1</sup> See cases *supra*, also *Thorndike v. Stone*, 11 Pick. 183; *Greeley v. Waterhouse*, 19 Maine, 9. So of a respondentia bond. *Conard v. Atlantic Ins. Co.* 1 Pet. 386.

<sup>2</sup> Chapter 27, 9 U. S. Stats. at Large, 440.

<sup>3</sup> *The Brig Draco*, 2 Sumner, 157, 189; *Fontaine v. Beers*, 19 Ala. 722.

<sup>4</sup> *The Atlas*, 2 Hagg. Adm. 48; *Jennings v. Ins. Co. of Penn.*, 4 Binn. 244; *Greeley v. Waterhouse*, 19 Maine, 9; *Leland v. The Ship Medora*, 2 Woodb. & M. 92, 107; *Rucher v. Conyngham*, 2 Pet. Adm. 295, 303; *The Brig Draco*, 2 Sumner, 157; *Bray v. Bates*, 9 Met. 237; *The William & Emmeline*, Blatchf. & H. Adm. 66; *The Brig Atlantic*, 1 Newb. Adm. 514; *The Emancipation*, 1 W. Rob. 124; *Stainbank v. Fenning*, 11 C. B. 51, 6 Eng. L. & Eq. 412. In *the Nelson*, 1 Hagg. Adm. 169, the sum was to be paid within one month "after the ship arrived at her port." This was held to be a sufficient description of a sea risk. In *Simonds v. Hodgson*, 3 B. & Ad. 50, the bond, after reciting that the vessel had received damage, and that the master had borrowed £1,077, proceeded as follows: "I bind myself, my ship, her apparel, tackle, etc., as well as her freight and cargo, to pay the above sum with £12 per cent bottomry premium; and I further bind myself, said ship, her freight and cargo, to the payment of that sum, with all charges thereon, in eight days after my arrival at the port of London; and I do hereby make liable the said vessel, her freight and cargo, whether she do or

himself this risk, he may charge for the use of the money, maritime interest, or extra interest, which will cover and compensate him for the risk he runs, which interest would be usurious but for that risk.<sup>1</sup> Such is the description in fact of nearly all bottomry bonds; but there seems no good reason why a bottomry bond may not provide for common interest, and for payment by the owner of the ship of the money borrowed whether the ship be safe or lost; and, nevertheless, be so far a bottomry bond as to bind the ship effectually and give a lien upon it which may be enforced as in the case of an ordinary bottomry.

It must be remembered that the law merchant not only permits such a bargain, but of itself, and by its own proper force, has this effect. For if a master borrow money abroad, for the necessities of the ship and so apply the same, and no instrument of bottomry or hypothecation is given, the law merchant gives to the lender a lien on the ship for the amount, in addition to any remedy he may have at common law against the owner as his debtor for money borrowed.<sup>2</sup> And it is not easy to see, why an instrument executed

*do not arrive at the port of London*, in preference to all other debts or claims, declaring that this pledge or bottomry has now, and must have, preference to all other claims and charges, until such principal sum, with £12 per cent bottomry premium, and all charges, are duly paid." Held, reversing the judgment of the Court of Common Pleas, 6 Bing. 114, that this was an instrument of bottomry, that the words *my arrival* must be understood to mean *my ship's arrival*, and that the words, "I make liable the said vessel, etc., whether she do or do not arrive at London," were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, and not to provide for the event of the loss of the ship.

<sup>1</sup> *Sharpley v. Hurrel*, Cro. Jac. 208; *Soome v. Gleen*, Sid. 27; *The Cognac*, 2 Hagg. Adm. 377, 387. In *The Atlas*, 2 Hagg. Adm. 48, 57, Lord Stowell said: "If the ship arrived safe, the title to repayment became vested; but if the ship perished *in itinere*, the loss fell entirely upon the lender. Upon that account, the lender was entitled to demand a much higher interest than the current interest of money in ordinary transactions. It partook of the nature of a wager, and, therefore, was not limited to the ordinary interest; the danger lay not upon the borrower, as in ordinary cases, but upon the lender, who was, therefore, entitled to charge his *pretium periculi*, his valuation of the danger to which he was exposed." In *White v. Ship Daedalus*, 1 Stuart, Lower Canada, 130, a bond on a voyage from Quebec to London at twenty-five per cent interest, was held to be valid. See also *Northwestern Ins. Co. v. Ferward*, 36 N. Y. 139; *The Yuba*, 4 Blatchf. C. C. 352.

<sup>2</sup> See *Wainwright v. Crawford*, 3 Yeates, 131, 4 Dall. 225. And it is said that the owner is liable for money borrowed in a case of necessity, although the necessity arose by the fault of the master. *Descadillas v. Harris*, 8 Greenl. 298.

between the parties, and intended to have this very effect, may not be permitted to do so.<sup>1</sup>

<sup>1</sup> It has been said, that unless more than legal interest is charged by the contract, it is not a loan on bottomry. *Leland v. The Medora*, 2 Woodb. & M. 92, 107; *The Mary*, 1 Paine, C. C. 671. In *The Emancipation*, 1 W. Rob. 124, 130, Dr. *Lushington* said: "I am aware that it is not absolutely necessary that a bottomry bond should carry maritime interest, and that a party may be content with ordinary interest; but when the character of an instrument is to be collected from its contents, and where the argument in support of the bond is that the advance of money was attended with risk, it is a material circumstance, that only an ordinary rate of interest should be demanded. It is impossible to conceive that any merchant carrying on his business with ordinary care and caution, would be content to divest himself of all security for the loan of his money but a bottomry bond, and ask no greater emolument than the ordinary interest of £6 per cent, if the repayment of such loan was to depend upon the safe arrival of the vessel at the port of her destination, after performing such a voyage." In this case only legal interest was stipulated for, and the repayment of the loan did not depend on the safe arrival of the vessel. The bond was held invalid. See also *Stainbank v. Fenning*, 11 C. B. 51, 6 Eng. L. & Eq. 412; *Jennings v. Ins. Co. of Penn.*, 4 Binn. 244. It does not appear very distinctly from the case of *Selden v. Hendrickson*, 1 Brock. C. C. 396, whether the bond was given on legal or on maritime interest, though the former seems to be the more probable, since the decree was for the amount of the bond with seven per cent interest, that being the legal interest at the port where the bond was given; and *Marshall*, C. J., said: "In fact I can conceive no reason, why a master may not, for the success of the voyage, hypothecate the vessel to secure a debt carrying only legal interest, in any case where he might bind the owner personally." See also *The Brig Atlantic*, 1 Newb. Adm. 514. In the case of *The Hunter*, Ware, 249, money was advanced, on the personal credit of the owner, for refitting the ship, and a bond subsequently given. The court held, that the bond was invalid, but, on the libel being amended, rendered a decree for the sum advanced with legal interest. Judge *Ware* said: "If the court has authority to separate the good from the bad, and to reduce the maritime premium when an oppressive advantage has been taken of the necessities of the borrower, is it quite certain that it may not, in the exercise of its equitable powers, render judgment, in a case like the present, for the principal sum advanced with land interest?" See also the remarks of Mr. Justice *Story* in the case of *The Virgin*, 8 Pet. 538, 550. But in the case of *The Brig Ann C. Pratt*, 1 Curtis, C. C. 340, where a sum of money was advanced on the faith of a bond, and subsequently a bond was made out in which a much larger sum was inserted, in order to deceive the underwriters, and two sets of accounts and vouchers were made out, Mr. Justice *Curtis* held the bond invalid on account of fraud, and also was of the opinion that the libellants had no lien *in rem* on the vessel for the amount actually advanced, on the ground that the parties contracted solely with reference to the bond, and did not intend that a lien should exist on the ship as a security for the simple loan. This case was affirmed on appeal, on

It is to be remarked, however, that a bottomry bond becomes payable not only when the ship arrives in safety, but also on some other contingencies, as when the voyage or adventure is broken up and terminated by a third party,<sup>1</sup> by the owner, or by his servant the master, by a voluntary and unnecessary act, in any way whatever; as by deviation;<sup>2</sup> or by a sale;<sup>3</sup> or by an intended wreck, or any intentional loss of the ship.<sup>4</sup> It is not necessary to say in the bond, that the ship is to be delivered or made over to no other use or purpose whatever, until payment of the bond is made, for

the ground of fraud, *Carrington v. Pratt*, 18 How. 63. In *The William & Emeline*, 1 Blatchf. & H. Adm. 66, the instrument, purporting to be a bottomry bond, bound the ship for a certain sum with simple interest, which was to be paid at all events. Judge *Betts* held, that, though this was not in strictness a bond, yet the vessel was liable *in rem*.

<sup>1</sup> *Greely v. Smith*, 3 Woodb. & M. 236.

<sup>2</sup> *Emerigon*, *Traité à la Grosse*, c. 8, § 4; *Harman v. Vanhatton*, 2 Vern. 717; *Western v. Wildy*, Skin. 152; *Williams v. Steadman*, id. 345. In *Wilmer v. The Smilax*, 2 Pet. Adm. 294, note, the bond was given for a specific voyage, which was never commenced, but the vessel performed another. Held, that the right of the owner to demand his money back was complete the moment the vessel sailed on the new voyage. But a deviation from necessity will not have this effect. *The Armadillo*, 1 W. Rob. 251.

<sup>3</sup> *The Brig Draco*, 2 Sumner, 157.

<sup>4</sup> In *Pope v. Nickerson*, 3 Story, 465, the vessel put into an intermediate port, having received damage, and was sold by the master. Subsequently she was repaired by the vendee and made a voyage to the United States. Mr. Justice *Story* said, p. 486: "The next question is, whether, in the events detailed in the statement of facts, and the evidence, the money on the bottomry bond became due, and payable to the lender? I am of opinion that it did become due. The voyage was not completed from any incapacity of the schooner to perform it; and in point of fact, she did, after being repaired, return safely to the United States. The voyage was broken up by the master voluntarily, upon the ground that the schooner was not worth repairing for the voyage, because the expense of the repairs would exceed her reasonable value, or what ought, with reference to the interests of the owners, to be expended upon her, to enable her to carry the cargo to the port of destination. I do not say that the master acted unwisely or improperly, under all the circumstances, in coming to this conclusion. Perhaps it was exactly what the owners might have done, if they had been personally present. If the owners had so abandoned the voyage, being personally present, because their interest would have been injuriously affected by not so doing; what ground could there be to say, that the bottomry bond should not be paid?" See also *Thomson v. Royal Exch. Ass. Co.* 1 M. & S. 30; *The Dante*, 2 W. Rob. 427; *The Catherine*, 1 Eng. L. & Eq. 679; *The Elephantia*, 9 Eng. L. & Eq. 553; *Thorndike v. Stone*, 11 Pick. 183; *Wallis v. Cook*, 10 Mass. 510.



the law implies this.<sup>1</sup> And where there are no laches on the part of the lender, his lien will be upheld even against a *bond fide* purchaser without notice.<sup>2</sup>

If marine interest is requisite to a bottomry loan, it may be presumed to be included in the principal sum.<sup>3</sup> The bond should describe sufficiently the risk which the lender assumes. This is, generally, the loss of the ship by the perils of the sea; and any such words as "the bond is gone if she does not arrive," or "if she is lost," or "the money to be paid after her safe arrival," are sufficient to indicate this. The risk must be such as justifies maritime interest;<sup>4</sup> and if the ship be lost by a peril, or from a cause not enumerated or implied, the debt survives, even with the maritime interest; as if the ship be lost through the misconduct of the master or owner.<sup>5</sup>

## SECTION II.

### OF BOTTOMRY BONDS MADE BY THE OWNER.

Bottomry bonds are often made, in this country, by the owner, in the home port.<sup>6</sup> Nor is any necessity whatever requisite, as far

<sup>1</sup> The Brig Draco, 2 Sumner, 157.

<sup>2</sup> Wilmer v. The Smilax, 2 Pet. Adm. 295, note; The Brig Draco, 2 Sumner, 157; The Catherine, 1 Eng. L. & Eq. 679. See also the judgment of Mr. Justice Powell, in Trantor v. Watson, 6 Mod. 11, 13.

<sup>3</sup> The Mary, 1 Paine, C. C. 671. "This," however, Mr. Justice Woodbury remarks, "makes the question of interest a nose of wax." Greely v. Smith, 3 Woodb. & M. 286, 257.

<sup>4</sup> See cases *ante*, p. 134, note 4.

<sup>5</sup> See *ante*, p. 137, notes 2, 3, 4.

<sup>6</sup> Wilmer v. The Smilax, 2 Pet. Adm. 295, note; The Brig Draco, 2 Sumner, 157; Thorndike v. Stone, 11 Pick. 183; Greeley v. Waterhouse, 19 Maine, 9. In The Duke of Bedford, 2 Hagg. Adm. 294, the bond was given by the owner of the ship, who was on board, at a foreign port. The master was also on board and received the supplies as necessary, but refused to sign the bond. A suit to dispossess the captain had previously been instituted. The court held, that the bond was valid. See also The Barbara, 4 Rob. Adm. 1; The Mary, 1 Paine, C. C. 671. And if, in such a case, the owner is also master, although he professes to contract as master, he confers the same rights as if he gave the bond as owner. The Ship Panama, Olcott, Adm. 343.

as his own interest is concerned.<sup>1</sup> He may make such a bond hypothecating a vessel before sailing on her first voyage, if he pleases. It is then nothing more than a borrowing of money at extra interest, the lender assuming an extra risk. Sometimes this is in fact little more than nominal; the whole transaction being substantially a legal loan for usurious interest with security; for a party may lend ten thousand dollars on a bottomry for fifteen per cent interest, when six per cent is the legal interest, and three per cent the usual premium for insurance on that voyage; and as a lender on bottomry has an insurable interest,<sup>2</sup> he may, by expending three per cent interest, insure the ship and secure the payment of his loan at all events, and yet receive his twelve per cent net for the use of his money. It is true that the uniform language of courts, both as to bottomry and respondentia bonds, is, that if the transaction be colorable only, and a mere pretence for getting usurious interest, it has none of the privileges given to these bonds, but is like any other loan on usury;<sup>3</sup> and this is a question for the jury. But there is no precise limit nor measure to marine interest; and in practice the interest must be far beyond the risks to be affected by the usury, as they would be measured by the mere rate of insurance.<sup>4</sup>

Bottomry bonds made abroad are generally made on the next voyage of the ship; which must be described with reasonable accuracy, or as near as the master can, but need not be precisely set forth.<sup>5</sup> When made at home, by the owner, they are frequently made on time, as for a year.<sup>6</sup>

<sup>1</sup> *Greeley v. Waterhouse*, 19 Maine, 9; *The Mary*, 1 Paine, C. C. 671; *The Brig Draco*, 2 Sumner, 157. But see *Greely v. Smith*, 3 Woodb. & M. 236, 254. So of a respondentia bond. *Conard v. Atlantic Ins. Co.* 1 Pet. 386; *The Brig Bridgewater*, Olcott, Adm. 35; *The Ship Panama*, Olcott, Adm. 343.

<sup>2</sup> 1 Parsons on Mar. Ins. 208-225.

<sup>3</sup> *Thorndike v. Stone*, 11 Pick. 187; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 437.

<sup>4</sup> See *ante*, p. 135, note 1.

<sup>5</sup> And where the voyage is not under the direction of the party granting the bond, but is under the control of government, a bond is not invalid because the voyage is not described. *The Jane*, 1 Dods. 461.

<sup>6</sup> *The Brig Draco*, 2 Sumner, 157; *Thorndike v. Stone*, 11 Pick. 183; *Bray v. Bates*, 9 Met. 237.

## SECTION III.

## WHEN THE MASTER MAY MAKE A BOTTOMRY BOND.

Although an owner may make a bottomry bond anywhere, and for any reason, the master can do so, only abroad and from necessity;<sup>1</sup> his power in this respect being exactly analogous to his power to sell; excepting that he may be justified, as we have already said, in giving a bottomry bond, by a less necessity than is required to authorize his sale of the ship. And the power belongs to any one who is lawfully master of the ship, however appointed;<sup>2</sup> as where he is appointed by the agent of the owners.<sup>3</sup> So, if he is appointed by the consignees of the cargo.<sup>4</sup> In one case where the captain was appointed by a foreign merchant, and gave a bond to him, the bond was held to be valid.<sup>5</sup> And in another case, the same was held in respect to a bond given to the charterer by whom the master was appointed.<sup>6</sup> So, too, the master of a transport, hired by government, and in the national service, may bottom her.<sup>7</sup> And the master of a belligerent ship that is in a foreign port by virtue of a cartel, may give a bond, and this may be enforced in the courts of the country to which the master is an enemy.<sup>8</sup> But a bottomry bond on a belligerent ship is discharged by the capture

<sup>1</sup> Sir Wm. Scott, in the case of *The Gratitude*, 3 Rob. Adm. 240, 266, speaking of the necessity which will authorize the borrowing of money on bottomry by the master, says: "Necessity creates the law, it supersedes rules; and whatever is *reasonable* and *just* in such cases, is likewise *legal*." See also *The Nelson*, 1 Hagg. Adm. 169; *The Rhadamanthe*, 1 Dods. 201; *The Gauntlet*, 3 W. Rob. 82, and cases *infra*.

<sup>2</sup> *The Orelia*, 3 Hagg. Adm. 75; *The Boston*, 1 Blatchf. & H. Adm. 309.

<sup>3</sup> *The Kennersley Castle*, 3 Hagg. Adm. 1. In this case it was doubtful whether the master was appointed by the agent of the owner, or by the agent of the underwriters, to whom the ship had been abandoned, or by both. The court were also inclined to the opinion that if he had been appointed by the underwriters alone, the bond would have been valid.

<sup>4</sup> *The Alexander*, 1 Dods. 278; *The Rubicon*, 3 Hagg. Adm. 9.

<sup>5</sup> *The Tartar*, 1 Hagg. Adm. 1. See also *The Brig Ann C. Pratt*, 1 Curtis, C. C. 340, 344.

<sup>6</sup> *Breed v. The Ship Venus*, U. S. D. C., Mass. 1805, Abbott on Shipping, Am. Ed. 159, n. 1.

<sup>7</sup> *The Jane*, 1 Dods. 461.

<sup>8</sup> *Crawford v. The William Penn*, Pet. C. C. 106, 3 Wash. C. C. 484.

of the ship; and the courts of the captors will not enforce it as a subsisting claim even in favor of a subject of the capturing power.<sup>1</sup> After the master has ceased to act and another is appointed, he cannot give a bond, since he is *functus officio*.<sup>2</sup>

If a ship be captured and restored to the owners, it is a detention or interruption of the voyage, and not a loss of the ship;<sup>3</sup> but if it be captured, condemned, and sold, and the proceeds afterwards restored to the owner by decree, this is a loss of the ship, and the owner holds the proceeds free from any claim of the bondholder on the bond;<sup>4</sup> and if, as has been said, there is no salvage in bottomry,<sup>5</sup> it would be difficult to give him any relief. But not only the justice of his claim, but some authorities indicate, what we must think should be the law, that he has such claim either by way of salvage, or in admiralty, on the general principles of equity.<sup>6</sup>

The necessity, though less than that requisite for a sale, must still be a real and a sufficient necessity. Therefore a master cannot hypothecate the ship for money borrowed for his own wants.<sup>7</sup>

<sup>1</sup> The Tobago, 5 Rob. Adm. 218.

<sup>2</sup> Walden v. Chamberlain, 3 Wash. C. C. 290.

<sup>3</sup> Joyce v. Williamson, 3 Doug. 164. This was an action on a bond which contained a clause, that if the ship should be taken by the enemy, cast away, miscarry, or be lost, before her safe arrival at New York, the bond should be void. The ship sailed on the voyage, was captured, and afterwards retaken and carried to Halifax, where part of the cargo was sold for salvage and repairs. The vessel afterwards arrived at New York with the remainder of her cargo on board. The ship and freight were then worth the sum in the bond, but not worth that sum together with what had been laid out in repairs. The bond was pronounced for.

<sup>4</sup> Appleton v. Crowninshield, 3 Mass. 443.

<sup>5</sup> See *post*, p. 151, n. 4.

<sup>6</sup> Appleton v. Crowninshield, 3 Mass. 443, 8 Mass. 340. In this case the vessel was captured and condemned. On appeal the decree was reversed and restoration ordered; and afterwards the value of the vessel and freight, with interest, was awarded to the owner. The court held that no action would lie on the bond, but intimated that an action for money had and received would lie against the owner. Accordingly such an action was brought, and the plaintiff recovered.

<sup>7</sup> King v. Perry, 3 Salk. 23. The following case is related by Loccenius, lib. 2, c. 6, § 12. The master of a ship being in a Spanish port, and having exposed the ship to seizure by his neglect to comply with a particular regulation of the country, entered into an agreement with a person who was supposed to possess sufficient influence to obtain the restitution of the ship, to pay him a very con-

Nor can he as master pledge the freight for his own use. But it is otherwise, if at the same time he is master and mortgagor in possession, and it is a question for the jury to decide in which capacity he acted.<sup>1</sup> And it must be the necessity of the ship; for he cannot make a bottomry of the ship for the benefit of the cargo.<sup>2</sup> That is a sufficient necessity which would induce an owner to do it if on the spot;<sup>3</sup> and therefore the master may hypothecate the vessel in a foreign country to enable him to return home, though the original voyage was broken up by capture and the compulsory sale of the cargo.<sup>4</sup> But this necessity of judging whether the owner would do it, does not exist if the owner himself can act or be consulted.<sup>5</sup> It is said that a master in a port of this country, may bottom his ship if her home port is in another State.<sup>6</sup> But this ruling cannot be sustained; for the master does not have the power of binding the ship to the payment of maritime interest, if the owner can be consulted, whether he be in the same, or in a neighboring State, or in another country. If the master be in the British provinces, and the owner in the State of Maine, within a day's sail or ride of him, the master can have no such power. It must be a foreign port in the sense of a distant port;<sup>7</sup> this is sufficient; and it may therefore be the port of destination.<sup>8</sup>

siderable sum with maritime interest, if he should procure the restitution of the ship, and she should afterwards return home in safety; and for securing the payment, executed an instrument in the nature of a bottomry bond. By the interest of the person with whom the agreement was made, the ship was restored, and afterwards returned home in safety; and he instituted a suit against the ship upon the instrument executed to him by the master. It was held that neither the ship nor her owners were chargeable. See also *Gibbs v. Sch. Texas*, Crabbe, 236.

<sup>1</sup> *Keith v. Murdoch*, 2 Wash. C. C. 297.

<sup>2</sup> *Fontaine v. Col. Ins. Co.* 9 Johns. 29.

<sup>3</sup> *The Fortitude*, 3 Sumner, 228, 246. In *The Medora*, 1 Sprague, 138, it is said: "They (the supplies) are necessary, if they are fit and proper for the service in which the vessel is engaged, and what the owner of that vessel, if a prudent man, would have ordered if present."

<sup>4</sup> *Crawford v. The Wm. Penn.* 3 Wash. C. C. 484.

<sup>5</sup> See *infra*, n. 7.

<sup>6</sup> *Selden v. Hendrickson*, 1 Brock. C. C. 396. The vessel in this case belonged to Richmond in Virginia, and the bond was given in New York.

<sup>7</sup> In a case of necessity, where it is impossible to communicate with the owners,

<sup>8</sup> *Reade v. Comm. Ins. Co.*, 3 Johns. 352.

The master, for the same reason, has no such power if he have funds of the owner within his reach; or if he can borrow the

the master may give a bond, although the owners reside in the same country. *La Ysabel*, 1 Dods, 273. And in *The Trident*, 1 W. Rob. 29, where the owner had lived in Scotland, it was held that the master might give a bond at Plymouth, England, the owner having died insolvent, and his personal representatives declining to interfere. So the master may pledge the credit of the owners in a port of the country in which they reside, if no communication can be had with them. *Arthur v. Barton*, 6 M. & W. 138; *Robinson v. Lyall*, 7 Price, 592. But not if a delay for the purpose of communication would work no injury. *Johns v. Simons*, 2 Q. B. 425; *Stonehouse v. Gent*, 2 Q. B. 431, n; *Beldon v. Campbell*, 6 Exch. 886, 6 Eng. L. & Eq. 473. In *The Rhadamanthe*, 1 Dods. 201, Sir Wm. Scott was of opinion that Cork was a foreign port as respected England, though the point was not decided. And in *The Barbara*, 4 Rob. Adm. 1, Jersey was held a foreign port in regard to London. But these distinctions are now done away with, and the only question is whether the owners could have been consulted. Thus in *The Oriental*, 3 W. Rob. 243, 2 Eng. L. & Eq. 546, the vessel was at New York, and the owners at St. Johns, New Brunswick. There was a telegraph between the two places. The master gave a bond without consulting the owners. Dr. *Lushington* held the bond was valid, but on appeal the judgment was reversed. *Wallace v. Fielden*, 7 Moore, P. C. 398. In the case of *The Bonaparte*, 3 W. Rob. 298, 1 Eng. L. & Eq. 641, a bond was given by the consent of the owners of the vessel on the ship, freight, and cargo. The shipper of the cargo was applied to, but refused to advance any money. It did not appear that the owners of the cargo had been notified. Dr. *Lushington* was of opinion that it was not necessary for the master to consult the owners of the cargo, and pronounced for the bond. On appeal, the privy council remitted the case to allow evidence to be taken, as to what notice, if any, had been given to the owners of the cargo. *Wilkinson v. Wilson*, 8 Moore, P. C. 459, 36 Eng. L. & Eq. 62. The law is stated by the court, on p. 473, and p. 70, of the respective reports, as follows: "That it is an universal rule, that the master, if in a state of distress, or pressure, before hypothecating the cargo, must communicate, or even endeavor to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so. If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken, therefore, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt." In *The Hamburg*, Brow. & L. 273, Lord *Chelmsford*, after citing the above, says: "This passage is obviously inaccurate. The judgment was not written, but appears to have been printed from a shorthand writer's note. It is not, however, difficult to collect what really was said by the learned judge, and, with a slight correction of the text, it would stand thus: "If according to the circumstances in which he is placed, it be reasonable that he should — if it be rational to ex-

money on the personal credit of the owner; or if a consignee be there with funds of the owner, or any agent of the owner;<sup>1</sup> or, it

pect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do, or at least to make the attempt.' That this is the true wording of the passage we have ascertained by communicating with the Lord Justice Knight *Bruce*, who delivered the judgment." On the case being sent back, further evidence was taken; it appeared that the British consul had written, on behalf of the master of the vessel and his agent, to the consignees in England, informing them of the damage sustained by the ship, but making no application for money, nor referring to the necessity for repairs. The letter also requested instructions as to what should be done. No answer was returned. *Dr. Lushington* held that under these circumstances the owners of the cargo were bound by the bond. *The Bonaparte*, 20 Eng. L. & Eq. 649. On appeal his decision was affirmed. 8 Moore, P. C. 459, 483, 36 Eng. L. & Eq. 75. See also, generally, *The Lochiel*, 2 W. Rob. 34; *The Wave*, 4 Eng. L. & Eq. 589; *Agricultural Bank v. The Bark Jane*, 19 La. 1. In *The Nuova Loanese*, 22 Eng. L. & Eq. 623, a bottomry bond was granted by the master at the port where the owner of the cargo, who was also charterer of the ship, resided. Advertisements for the loan were published. This fact was known to the owner of the cargo, and he was also aware that the ship was unseaworthy, and that the cargo had been laden and unladen while the ship was in port. No direct communication or application for advances, was made to him. Held that the bond was invalid as far as his interest was affected. It is true that in the case of *The William and Emmeline*, 1 Blatchf. & H. Adm. 66, 71, Judge *Betts* held that Charleston, South Carolina, was a foreign port in respect to New York, but this case was decided in 1828, when a long time was required for communication between the two cities, and moreover, though a bond was given in the case, yet it was informal, and the case was decided on the ground that repairs furnished in another State constitute a lien on the ship. See *The Yuba*, 4 Blatchf. C. C. 352.

<sup>1</sup> *Tunno v. Ship Mary, Bee*, 120; *Boreal v. The Golden Rose*, id. 131; *Putnam v. Sch. Polly*, id. 157; *Sloan v. Ship A. E. I.*, id. 250; *Forbes v. The Hannah*, id. 348, *Hopk.* 176; *Canizares v. The Santissima Trinidad*, *Bee*, 353, *Hopk.* 185; *Rucher v. Conyngham*, 2 Pet. Adm. 295; *Cupisino v. Perez*, 2 Dall. 194; *The Ship Lavinia v. Barclay*, 1 Wash. C. C. 49; *The Ship Packet*, 3 Mason, 255; *Ross v. The Ship Active*, 2 Wash. C. C. 226; *Walden v. Chamberlain*, 3 Wash. C. C. 290; *Patton v. The Randolph*, *Gilpin*, 457; *The Nelson*, 1 Hagg. Adm. 169; *The Rhadamanthe*, 1 Dods. 201; *The Sydney Cove*, 2 Dods. 1, 7; *The Medora*, 1 Sprague, 138. In the case of *The Virgin*, 8 Pet. 538, the court held that if the necessity for the supplies and advances is once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case. It was also held that it was not enough to show that there were funds at the port of distress, which ought to have been appropriated to the use of the ship, and that the master was justified in giving a bond if he could not obtain them, because, "the non-existence of funds, and the

is said, if the master has funds of his own.<sup>1</sup> If the master, in a foreign port, has funds of his own, which he wishes to use for a profitable mercantile purpose, it would be hard to require him to lend them to the owner for mere common interest, and yet there is no authority for permitting a master to take a bottomry bond to himself, or to charge in any way more than legal interest for the use of his money, whatever may be the degree in which that falls below actual compensation.

The master is not bound to take the money on board which belongs to the shippers, nor, perhaps, has he a right to do this.<sup>2</sup>

non-ability to get at them, must, as to the master, be deemed to be precisely equal predicaments of distress."

<sup>1</sup> In the case of *The Ship Packet*, 3 Mason, 255, 263, Mr. Justice Story said: "If the master has money of his own on board sufficient for the ship's necessities, it is by no means certain that he has a right in such a case to resort to the extraordinary measure of bottomry. In case of there being money of the owner of the ship on board, it is very clear that he cannot resort to bottomry. And although I would not absolutely decide that under no circumstances he could so resort, where he has sufficient money of his own on board; yet if he can, it must be in a case of a very peculiar character, and such as ought to induce the court to uphold it from great public principles." In *Canizares v. The Santissima Trinidad*, Bee, Adm. 353, the master had goods of his own on board, and could also have procured money from the intendant at the port of distress. Held, that he had no authority to give a bond. Same case on appeal, *Cupisino v. Perez*, 2 Dall. 194. But if this latter element had been wanting, we think that a bond given by him would be valid. See *The William & Emmeline*, 1 Blatchf. & H. Adm. 66, 72.

<sup>2</sup> In the *Ship Packet*, 3 Mason, 255, it was objected that the master should not have given a bond, as he had specie dollars on board which belonged to some of the shippers. Mr. Justice Story said, p. 258: "The general principle is, that he (the master) is bound to act with a reasonable discretion. He is to get the necessary repairs done at as little sacrifice as is practicable. If he has money on board, and the use of that will be the least sacrifice, he ought to resort to it in the first instance. But there may be cases, in which the use of such money would be the greatest sacrifice that could be made, and the whole objects of profit in the voyage might be thereby defeated. Suppose a voyage to the East Indies or China, in which the principal outward property on board is Spanish dollars, and a disaster happens on the first passage, requiring repairs, the use of those dollars may be the most mischievous exercise of his discretion, and destroy the hopes of the voyage. . . . In all these cases, therefore, much must be left to the master's discretion, and he must exercise it conscientiously for the general interest. If he acts *bonâ fide* and with reasonable care, the rights of the parties are bound up by his acts, although it should afterwards be found, that he had committed an error in judgment, and might have acted more beneficially in another manner."



It is said that he cannot bottom the ship if a part-owner, or the agent of a part-owner, be present.<sup>1</sup> But this may be doubted; and certainly there can be no such inflexible rule.<sup>2</sup> The master is the agent of all the owners. And the presence and refusal of any one or more, ought not, *of itself*, to deprive the master of the power or relieve him from the duty of providing for the interests of all. But in such a case, the necessity must doubtless be particularly certain and pressing.

Nor can a master make this bond merely to secure former debts of the owner;<sup>3</sup> but might, perhaps, if it were the only way to

<sup>1</sup> *Patton v. The Randolph*, Gilpin, 457. See also *Selden v. Hendrickson*, 1 Brock. C. C. 396. Kent (3 Comm. 172) says, on the authority of Boulay Paty, *Cours de Droit Com. Mar.* tome 2, p. 271, that if only a minority of the owners are present, the captain's power remains good.

<sup>2</sup> In some cases not only has the bond been pronounced valid, where there was at the time an agent at the place, but it has been also held, that a master may give a bond to the agent himself. See *post*, p. 156, n. 1.

<sup>3</sup> *Hurry v. Ship John & Alice*, 1 Wash. C. C. 293; *Walden v. Chamberlain*, 3 Wash. C. C. 290; *Clark v. Laidlaw*, 4 Rob. La. 345; *The Aurora*, 1 Wheat. 96; *The Lochiel*, 2 W. Rob. 34; *The Osmanli*, 3 W. Rob. 198; *Smith v. Gould*, 4 Moore, P. C. 21. But see *The Mary Ann*, 10 Jurist, 253, 4 Notes of Cases, 376, 390. In the case of *The Ocean*, 10 Jur. 504, 4 Notes of Cases, 566, A bought up several simple contract debts, due on account of a certain vessel. He afterwards advanced money on bottomry on the same ship, and repaid himself out of the money so advanced the sums which he had paid for the contract debts. Held, that as to this part of the transaction the bond was void. In *Cohen v. Sch. Amanda*, Crabbe, 278, the bond was given to a party on condition that he should assume the debts which the vessel owed. No question seems to have been made as to the validity of such a bond. Payment was contested on the ground that the debts had not been paid. The Court held, that the defence should be clearly made out to contradict the *prima facie* presumption afforded by the bond. In *The North Star*, Lush. Adm. 45, Dr. *Lushington* held that a debt for a general average contribution, arising in respect of an outward voyage, was not a sufficient foundation for a bond on the ship for the homeward voyage. In *The Edmond*, Lush. Adm. 57, Dr. *Lushington* held that the master had only authority to bottom his vessel for repairs, necessary provisions, and articles furnished to the ship itself, and could not include in the bond charges relating to the outward cargo, unless the ship could be arrested for the same, although the owner had received by anticipation the largest part of the freight, and had assigned a large part of the remainder, and thereby had deprived the master of the usual means of defraying the expenses which might occur. On reference to the registrar and merchants, they allowed items of port charges, towage, lighterage, discharging expenses of outward cargo, and ballast. And it appeared that these items were allowed in the case of *Smith v. Gould*, 4 Moore, P. C. 21. *The Edmond*, Lush. Adm. 211. See *The Yuba*, 4 Blatchf. C. C. 352.

liberate the ship from arrest and sale for those debts.<sup>1</sup> And if a bond, given by the owner, includes other and former debts, those debts are merged in the bond, and are discharged by whatever discharges the bond, and no other or former securities on those debts are enforceable by themselves, or available in any way excepting through the bond.<sup>2</sup>

The master may give a bond for the amount due in good faith for compensation for services rendered in a foreign port by a consul of the country to which the ship belongs.<sup>3</sup>

#### SECTION IV.

##### OF THE DUTY AND OBLIGATION OF THE LENDER ON BOTTOMRY.

As there must be a necessity to justify the master in making the bond, so the lender must see to it, that this necessity exists.<sup>4</sup>

<sup>1</sup> See *post*, p. 153, n. 2.

<sup>2</sup> *Bray v. Bates*, 9 Met. 237.

<sup>3</sup> *The Zodiac*, 1 Hagg. Adm. 320. See also *The Cynthia*, 20 Eng. L. & Eq. 623.

<sup>4</sup> *Putnam v. Schooner Polly*, Bee, Adm. 157; *Gibbs v. Sch. Texas*, Crabbe, 236; *The Aurora*, 1 Wheat. 96; *The Boston*, 1 Blatchf. & H. Adm. 309, 324; *The Orelia*, 3 Hagg. Adm. 75, 84; *Heathorn v. Darling*, 1 Moore, P. C. 5; *The Royal Stuart*, 2 Spinks, Adm. 258, 33 Eng. L. & Eq. 602. In *Walden v. Chamberlain*, 3 Wash. C. C. 290, it was held, that the lender on bottomry ought always to prove the necessity for the advances, and that they were made to enable the master to prosecute his voyage, and that the necessity for such advances, or that they were made on the credit of the vessel, was never to be presumed. In *Soares v. Rahn*, 3 Moore, P. C. 1, s. c. *The Prince of Saxe Cobourg*, 3 Hagg. Adm. 387, the bond was given by the master, who was also a part-owner. The agent of the charterer, and sole owner of the cargo, was ready and willing to advance money. The bondholders were not aware of this, but they had made no inquiries in regard to it. The bond was pronounced invalid though the holders were the lowest bidders at the auction advertised by the master. The court said: "If the foreign merchant, after due inquiry, shall have reasonable ground for concluding that the repairs are necessary, and that the money cannot be raised on personal credit, then his security on the ship and cargo shall not be impeached or invalidated, because it might happen that, notwithstanding his reasonable and *bond fide* inquiries, the repairs were not necessary, or the money might have been had on personal credit." But, although he is bound to show a reasonable case of unprovided necessity for the advance, yet he is not bound to inquire into the expediency of incurring the expense of the repairs with reference to the interest of the owner

Probably the same rule would be applied as in the sale of a ship, and if a sufficient necessity seemed to the lender to exist, after all reasonable precaution and inquiry on his part, it would be enough; although in fact he were mistaken.<sup>1</sup> If he connives in any way at any fraud of the master, this avoids the bond *in toto*, nor has he any lien on the ship for the amount actually advanced;<sup>2</sup> but the fraud of the master or borrower does not have this effect if the lender were neither participant in, nor conusant of it;<sup>3</sup> nor is the lender bound to see that the master actually applies the funds thus raised to the ship's necessities.<sup>4</sup>

If the owner resists payment of the bond on the ground of the fraud of the lender, or because the master had, within his reach, either the funds or a sufficient personal credit of the owner, the *onus* is upon him to prove this; and there is even a presumption in favor of the lender, that he did make the proper inquiries and was reasonably satisfied of the necessity.<sup>5</sup> It has been said that the master is not a competent witness for the libellant, to prove the necessity of repairs; because a decree for the libellant on this ground, might be used by the master in a suit against him by the

*Duncan v. Benson*, 1 Exch. 537, 555; *The Vibilia*, 1 W. Rob. 1, 10. In the case of *The Brig Bridgewater*, *Olcott*, Adm. 35, it was held, that in an action on a bond, the production and proof of the execution of it will not entitle the holder to a decree in his favor; but he must show that a necessity existed for the expenditures, and he should exhibit an account of the items of expenses, etc. See also *Clark v. Laidlaw*, 4 Rob. La. 345; *The William and Emmeline*, 1 Blatchf. & H. Adm. 66, 76; *Thomas v. Osborn*, 19 How, 22, 31 and *infra*, n. 5.

<sup>1</sup> *The Ship Fortitude*, 3 Sumner, 228, 249. See also *Soares v. Rahn*, 3 Moore, P. C. 1; *The Yuba*, 4 Blatchf. C. C. 352.

<sup>2</sup> *The Nelson*, 1 Hagg. Adm. 169, 176; *The Tartar*, *id.* 1, 14; *The Brig Ann C. Pratt*, 1 Curtis, C. C. 340, s. c. affirmed on appeal, *Carrington v. Pratt*, 18 How. 63.

<sup>3</sup> *Atlantic Ins. Co. v. Conard*, 4 Wash. C. C. 662, 1 Pet. 386.

<sup>4</sup> *Scarborough v. Lyrus*, *Latch*, 252, *Noy*, 95, 14 Vin. Ab. Hyph. (A) pl. 2; *The Ship Fortitude*, 3 Sumner, 228; *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 437; *The Virgin*, 8 Pet. 538, 553; *The Orelia*, 3 Hagg. Adm. 75, 84; *The Jane*, 1 Dods. 461, 464; *The Royal Stuart*, 2 Spinks, Adm. 258, 33 Eng. L. & Eq. 602.

<sup>5</sup> *The Ship Fortitude*, 3 Sumner, 228; *The Virgin*, 8 Pet. 538; *The Duke of Bedford*, 2 Hagg. Adm. 294, 300; *The Vibilia*, 1 W. Rob. 1, 5; *The Mary Ann*, 10 Jur. 253, 4 Notes of Cases, 376. In this case stress is laid on the facts that the bond was signed by the master, who was the agent of the owners, and that the bond was negotiable; like a bill of exchange; and it is said that a person seeking to impeach a bond must prove his case in the same way that a man, admitting his sig-

owner for making unnecessary repairs.<sup>1</sup> But his competency is now generally admitted.<sup>2</sup> If the lender is in debt to the owner of the ship, he is bound to apply the amount due to the necessity of the ship, and cannot, by advancing it, create an independent claim against the owner, and bind the ship to this with maritime interest.<sup>3</sup>

If the lender, from improper motives, connives with the master to send the ship on a new voyage, not authorized by the owner, this is a fraud which will defeat his bottomry bond.<sup>4</sup> But the power of the master is not limited to necessities to complete his original voyage. He may thus raise money to perform any voyage he is authorized by law to undertake, if there be no collusion between him and the lender.<sup>5</sup>

## SECTION V.

### WHEN LENDER MAY TAKE ADDITIONAL SECURITY.

It seems to be settled that the lender on bottomry may take other and additional securities for his debt, provided these securities are also discharged by anything which discharges the bond. Thus they will only make the repayment more certain if the ship arrives, but will not give any claim to the money if the ship does

nature to an ordinary bond, must prove its invalidity, or that he has discharged it. It is also held that mortgagees seeking to impeach the bond are governed by the same rules as the owners of the vessel, and are bound in the same way by the act of the master. See *ante*, p. 147, n. 4.

<sup>1</sup> *The Ship Fortitude*, 8 Sumner, 228. But see the further remarks of Mr. Justice Story, on this point, in the same case, p. 264; and *Furniss v. The Brig Magoun*, Olcott, Adm. 55, 60. In this case Judge *Betts* held, that he was competent, especially if released. He was also held competent in *The Medora*, 1 Sprague, 138. See also *Evans v. Williams*, 7 T. R. 481, note; *Rocher v. Busher*, 1 Stark. 27; *Milward v. Hallett*, 2 Caines, 77.

<sup>2</sup> See preceding note.

<sup>3</sup> *Rucher v. Conyngham*, 2 Pet. Adm. 295; *The Aurora*, 1 Wheat. 96; *Hurry v. The Ship John & Alice*, 1 Wash. C. C. 293; *The Hebe*, 2 W. Rob. 146.

<sup>4</sup> *The Virgin*, 8 Pet. 538; *The Reliance*, 3 Hagg. Adm. 66.

<sup>5</sup> *The Virgin*, 8 Pet. 538, 552; *The Hunter, Ware*, 249, 253. See also *The Tartar*, 1 Hagg. Adm. 1; *The Mary Ann*, 4 Notes of Cases, 376, 381, 10 Jur. 253. In *The Reliance*, 3 Hagg. Adm. 66, the ship was freighted from London to

not arrive.<sup>1</sup> This ruling seems to be inconsistent with what is sometimes said, that a bottomry bond cannot give, and never does give, any claim against the owner personally.<sup>2</sup> Practically it may not often give this claim, because there is the ship, which is ample security; and if the ship be not there and that security is lost, then the debt is paid, or, at least, the bond is discharged by that loss. This question is not without its difficulties, nor are we much aided in reference to it, by adjudication. It would seem, however, that by the ordinary bond of bottomry, the owners are not personally held. That is, they are usually so written as to confine the lender Calcutta and back. The agents there, upon whom the master had a limited credit, and which he had exhausted, induced the master to undertake a series of voyages in defiance of the owner's instructions. The bond was given for advances made on one of these voyages. Held, that it was void, for if a necessity existed, it arose from the conduct of the parties in whose favor it was given.

<sup>1</sup> *The Jane*, 1 Dods. 461, 466; *The Tartar*, 1 Hagg. Adm. 1.; *The Nelson*, 1 Hagg. Adm. 169, 178; *The Kennersley Castle*, 3 Hagg. Adm. 1; *The St. Catherine*, 3 Hagg. Adm. 250; *The Emancipation*, 1 W. Rob. 124, 129; *The Ariadne*, 1 W. Rob. 411, 421; *The Lord Cochrane*, 2 W. Rob. 320; *The Mary Ann*, 4 Notes of Cases, 383; *The Hunter*, Ware, 249; *The Sch. Zephyr*, 3 Mason, 341; *Leland v. The Ship Medora*, 2 Woodb. & M. 92, 100; *Greely v. Smith*, 3 Woodb. & M. 236; *The Brig Atlantic*, 1 Newb. Adm. 514; *Kelly v. Cushing*, 48 Barb. 269. So if property is mortgaged to secure a bond, the mortgage is defeated by whatever avoids the bond. *Thorndike v. Stone*, 11 Pick. 183; *Bray v. Bates*, 9 Met. 237.

<sup>2</sup> Mr. Justice *Story*, in the case of *The Virgin*, 8 Peters, 538, 554, stated the law as follows: "In England and America the established doctrine is, that the owners are not personally bound except to the extent of the fund pledged, which has come into their hands. To this extent, indeed, they may correctly be said to be personally bound; for they cannot subtract the fund, and refuse to apply it to discharge the debt. But in that case the proceeding against them is rather in the character of possessors of the thing pledged, than strictly as owners. In the present case, the value of the ship, the only fund out of which payment can be made, falls far short of a full payment of the amount due upon the bottomry bond. But this is the misfortune of the lender, and not the fault of the owners. They are not to be made personally responsible for the act of the master, because the fund has turned out to be inadequate; since by our law he had no authority by a bottomry bond to pledge the ship, and also the personal responsibility of the owners. The consequence is, that the loss, ultra the amount of the fund pledged, must be borne by the libellant." See also *Cupisino v. Perez*, 2 Dall. 194; *The Ship Fortitude*, 3 Sumner, 228, 230; *Johnson v. Shippen*, 1 Salk. 35, 2 Ld. Raym. 982; *Benson v. Duncan*, 3 Exch. 644, 656; *Stainbank v. Fenning*, 11 C. B. 51, 6 Eng. L. & Eq. 412; *The Tartar*, 1 Hagg. Adm. 1, 13; *The Nelson*, 1 Hagg. Adm. 169, 176. But see *Greely v. Smith*, 3 Woodb. & M. 236, 249.

to the ship in any event, giving the owner the right to abandon the ship to the lender, on its safe arrival, and to exempt himself from further responsibility. We do not know that the parties might not make a different bargain; but the rule of the Supreme Court of the United States seems to confine the claim to the property.<sup>1</sup>

If a master destroys a ship, or if an owner causes it to be destroyed, there would then be a remedy against the wrongdoer personally; and so there would be, perhaps, whenever by the fault of the master or owner, the lender lost the security of the ship.<sup>2</sup> If the owner chooses to sell a wrecked or injured ship because her repairs will cost more than she will be worth, he may, by abandonment, make this a total loss against insurers; but not against a bottomry bondholder; for here there is no abandonment.<sup>3</sup> Nor, says Mansfield, is there any salvage or average upon a bottomry bond.<sup>4</sup> But the parties may stipulate that the bondholder shall

<sup>1</sup> The eighteenth Rule of Practice in the Admiralty, prescribed by the Supreme Court, is as follows: "In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only, against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer." If the voyage is put an end to by the fraudulent act of the master, it would seem, therefore, that if no proceeds of the ship or cargo can be got at, the only remedy is against the master. See *The Brig Ann C. Pratt*, 1 Curtis, C. C. 351, per *Curtis*, J. Although, if the owner by his own act prevents the ship from arriving, then he is personally liable, as has been already said.

<sup>2</sup> We are not aware of any cases which would lead to the conclusion that an action against the owner can be sustained unless distinctly for his own wrong doing. *The Elephanta*, 9 Eng. L. & Eq. 553, is an important case on this point. There the bond was given on ship, freight, and cargo, and was not to be put in force in case the ship and her cargo should be lost, or should miscarry, or be cast away on the voyage. The ship did not arrive at her port of destination, but was abandoned as for a total loss at Algoa Bay, where part of the cargo was sold, and the proceeds brought to England, and part put into another ship, and also brought to England. It did not appear that the ship could not be repaired. The bond was enforced against the proceeds of the ship, the cargo which had been sold, and against that transhipped. See also *Pope v. Nickerson*, 3 Story, 465.

<sup>3</sup> *Thompson v. Royal Exch. Ass. Co.*, 1 M. & S. 30; *The Elephanta*, 9 Eng. L. & Eq. 553; *The Dante*, 2 W. Rob. 427; *Ins. Co. of Penn. v. Duval*, 8 S. & R. 138; *Pope v. Nickerson*, 3 Story, 465.

<sup>4</sup> *Joyce v. Williamson*, 3 Doug. 164. See also *Walpole v. Ewer, Park, Ins.*

be liable to contribute in general average.<sup>1</sup> And it is now very common to provide that he shall be liable both for average and salvage. In such a case he contributes only on the value of the property hypothecated without the addition of maritime interest,<sup>2</sup> and he is entitled to contribution and to salvage.

## SECTION VI.

### OF A BOTTOMRY BOND FOR SUPPLIES OR REPAIRS.

If the master order the supplies and they are rendered, and the repairs made, and the bottomry bond given afterwards, this bond is good if it was originally intended to furnish the supplies on the credit of the ship, and to secure this by a bottomry bond;<sup>3</sup> but if

565, per Lord *Kenyon*, C. J.; *Robertson v. United Ins. Co.*, 2 Johns. Cas. 250, 252, per *Kent*, J. By the Ordinance of Hamburg the lender does not contribute to general average. Tit. 8, art. 2; 2 Magens, No. 931. In France the law is the other way. Code de Commerce, n. 141; Le Guidon, c. 19, a. 5. So in Denmark. *Walpole v. Ewer, Park*, Ins. 565.

<sup>1</sup> *Ins. Co. of Penn. v. Duval*, 8 S. & R. 138.

<sup>2</sup> *Gibson v. Philadelphia Ins. Co.*, 1 Binn. 405.

<sup>3</sup> *The Virgin*, 8 Pet. 551, 552; *La Ysabel*, 1 Dods. 273, 276; *The Augusta*, 1 Dods. 283; *The Alexander*, 1 Dods. 278, 280; *The St. Catherine*, 3 Hagg. Adm. 250; *The Rubicon*, 3 Hagg. Adm. 9; *Furniss v. Brig Magoun*, Olcott, Adm. 55, 63; *The Ship Panama*, Olcott, Adm. 343, 350. In the case of *The Vibilia*, 1 W. Rob. 1, it was held that, where advances were made on the personal credit of the master, or owners, and a bond subsequently given, the bond was void, but that where advances had been made without direct evidence as to any original understanding, or contract and followed by a bond, the law presumed that a bond was contemplated in the first instance. In the case of *The Trident*, 1 W. Rob. 29, on the arrival of the vessel at the port of distress, it was necessary to defray certain minor expenses, such as pilotage dues, etc. These were paid by a firm there without any contemplation of a bottomry bond. Subsequently, further expenses being required, the same parties were applied to, but refused to advance more money unless a bond was given. This was done for the whole amount, including the sums first advanced. The bond was held valid *in toto*. See also *Smith v. Gould*, 4 Moore, P. C. 21. In *The Gauntlet*, 3 W. Rob. 82, when the vessel arrived at the intermediate port the crew were in a state of mutiny, and the master dispossessed of his command. The authorities of the port took the master and crew on shore, and kept them in close confinement. It was held that a bond given for the expenses incurred by a person employed by the British vice-consul to investigate into the mutiny, and reinvest the master in his command,

the original purpose and understanding were to furnish them on the personal credit of the master, or of the owner, either or both, without reference to the ship, it would seem to be settled that the bargain cannot be changed and a bottomry bond given for this existing debt with extra interest.<sup>1</sup> If, however, the ship should be held in the foreign port for this debt, and there was no way of liberating her but by this bottomry, we should say that it would be valid, if made in good faith.<sup>2</sup> So we hold, generally, that if the

was valid, although no mention was made of a bond at the outset of the inquiry, and the bond was taken immediately before the vessel sailed from the port. The court said: "In the course of the argument it was pressed upon the court, that when Mr. Jeffries first stepped forward to render his assistance, there was no express mention that he was to be reimbursed by a bond of bottomry. I do not think that this fact, under the peculiar circumstances of the case, can invalidate the subsequent bottomry transaction. It is very true, that upon general principles, where work has been done, or advances made upon personal security in the first instance, the party doing the work, or making the advances, is not at liberty to turn round upon the owners, and cover himself by exacting a bond of bottomry from the master; but what is the case here? The expenses incurred by this vessel, and for which this bond was given, were incurred when the master was out of possession of the ship, and when he was incompetent to take charge of her, or to do anything in her behalf."

<sup>1</sup> The Hunter, Ware, 249; Sloan v. Ship A. E. L. Bee, Adm. 250; Rucher v. Conyngham, 2 Pet. Adm. 295; The Augusta, 1 Dods. 283; The Hero, 2 Dods. 139, 147; The Hersey, 3 Hagg. Adm. 404, affirmed Gore v. Gardiner, 3 Moore, P. C. 79; The Wave, 4 Eng. L. & Eq. 589. See also The Ariadne, 1 W. Rob. 411, 419.

<sup>2</sup> In The Aurora, 1 Wheat. 96, Mr. Justice Story said: "It is undoubtedly true, that material men and others, who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the admiralty to enforce that right. And it must be admitted that, in such a case, a *bond fide* creditor, who advances his money to relieve the ship from an actual arrest on account of such debts, may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he have no other sufficient funds, or credit, to redeem the ship from such arrest." The point, however, was not decided. In The Vibilia, 1 W. Rob. 1, it was held that the fact, that a lien existed on the ship by the law of the country in which the bond was given, was an important ingredient, and furnished a presumption in favor of bottomry, and against personal credit. But we are not inclined to carry the law further than this, and to say that in all cases the arrest of the ship would authorize the giving of a bond by the master. In The Aurora, above cited, it was held that a mere threat to arrest the ship for a pre-existing debt, would not justify the master in giving a bond. See also The Boston, 1 Blatchf. & H. Adm. 309, 324. It is true that in the case of Smith v. Gould, 4 Moore, P. C. 21, Lord Campbell used language which is inconsistent



liberation of the ship from arrest for debt is a good cause for bottomry, yet if the attaching creditor is himself the obligee, the bond is invalid.<sup>1</sup> However the law may be in regard to the arrest of the ship, it is clear that the fact of the master's being arrested will not be sufficient to authorize the giving of a bond to raise money to procure his release, although he was arrested for a debt contracted for the vessel in his capacity of master.<sup>2</sup>

with this view of the case. The vessel, bound for New York, had a very long passage, and having got out of water, the persons on board used some cases of porter belonging to a freighter. On arrival the consignee threatened to sue the ship for the non-delivery. The captain raised money to pay for the damage done, by the bond on which this suit was brought. It did not appear in evidence whether by the laws of New York the ship could have been arrested, and the bond was pronounced to be void. But Lord *Campbell* expressed his opinion that a master might hypothecate his vessel in any case where it might be arrested and sold for a demand for which the owner would be liable. The whole subject was discussed at great length by Dr. *Lushington*, in the case of *The Osmanli*, 3 W. Rob. 198, and a conclusion contrary to that of Mr. Justice *Story* arrived at. The *Osmanli* was arrested for debts due from her owner, on account of advances made for *The Osmanli* and for other ships of the same owner, on former voyages. The arrest was legal in all respects, though of course the ultimate consequences of it could not be determined. The captain borrowed money on bottomry to release the vessel, the lender knowing it was to be so applied. The bond was held to be invalid. In *The Augusta*, 1 Dods. 283, 288, Lord *Stowell* remarked: "It has been said that the party might, by the law of Russia, have detained this ship till the money was repaid; but I do not think that circumstance alone will be sufficient to convert this into a case of hypothecation. Ships might, in all cases, be detained on the same ground by the general law of Europe, and if the position, which has been laid down, were to be supported, it would go the length of turning every case into a case of hypothecation, or at least there would be a necessity of inquiring, in every case, into the state of the foreign law." See *The Yuba*, 4 Blatchf. C. C. 352.

<sup>1</sup> Thus Mr. Justice *Story*, in the case of *The Aurora*, 1 Wheat. 96, 105, said: "Nor does it by any means follow, because a debt sought to be enforced by an arrest of the ship might uphold an hypothecation in favor of a third person, that a general creditor would be entitled to acquire a like interest. It would seem against the policy of the law to permit a party in this manner to obtain advantages from his contract for which he had not originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practise gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country."

<sup>2</sup> *Smith v. Gould*, 4 Moore, P. C. 21. See also *The Aurora*, 1 Wheat. 96. It is obvious that these questions can only arise in regard to old debts. For if advances are made to the ship, they are either on the credit of the ship, or of the

## SECTION VII.

## OF A SECOND BOTTOMRY BOND.

If a master in a foreign port bottom his vessel, and then go to another port and make a new bottomry, the funds necessary to pay off the former bottomry may enter into the new one. But it would seem that the holders of the second bond will then stand only as the assignees of the first; so far at least, that if the first bond was not good because not necessary, or for any fraud in the lender, the second bond will not be good for so much as paid off the first bond, although the second bondholder advanced the money in good faith.<sup>1</sup>

## SECTION VIII.

## TO WHOM A BOTTOMRY BOND MAY BE MADE.

Whether a bottomry bond may be given to a consignee of the ship, or to any party holding to the ship-owner the relation of agent to principal, has been much controverted. Upon the whole, however, we are decidedly of opinion, both from the reason and justice of the case, and from the authorities, that such a bond may be

master or owner. If the latter, the ship could not be legally arrested, and if illegally, it is clear that no necessity would exist for the giving of a bond. If they are made on the credit of the ship, we have seen that a bond is valid, although given subsequently. The case of *The Osmanli* proceeds on the ground that as the master has no right to bottom for old debts, so he has not the right, when the ship is arrested for those debts. See *The Edmond*, Lush. Adm. 57.

<sup>1</sup> *Dobson v. Lyall*, 8 Jur. 969; *Walden v. Chamberlain*, 8 Wash. C. C. 290; *The Aurora*, 1 Wheat. 96. See also *Conard v. Atlantic Ins. Co.*, 1 Pet. 436, where the loan was applied in discharge of a prior loan. Mr. Justice Story said: "In our judgment, that makes no difference as to the legal rights of the parties. The borrower had a right to apply the loan in any manner he pleased, and the mode of its application, if it be otherwise *bonâ fide* and legal, does not change the posture of the rights of the lender." This was a case of a bond given by the owner of the cargo. So in *Greeley v. Waterhouse*, 19 Maine, 9, it was held that where a bottomry bond is given by an owner to secure an old debt, if that was to be discharged to the extent of the bond, the bond might be regarded as a new loan on bottomry, but not where the bond was intended merely as a collateral security for the old debt. In *Merwin v. Shailer*, 16 Conn. 489, the vessel put into Charleston for repairs. The master borrowed a sum of money on bottomry from A. Subsequently, another master was appointed who borrowed an equal

valid.<sup>1</sup> Undoubtedly it would come into court under circumstances which, if not exciting suspicion, should at least call for

sum from B, and took up the first bond. The court held that the owners were not liable for this last, such change of responsibilities not growing out of the necessities of the voyage, or the safety of the vessel.

<sup>1</sup> If the consignee has funds in his hands belonging or due to the owners of the vessel, it is well settled that he cannot lend his own money on bottomry. *Hurry v. The Ship John & Alice*, 1 Wash. C. C. 293; *The Ship Lavinia v. Barclay*, 1 Wash. C. C. 49; *Ross v. The Ship Active*, 2 Wash. C. C. 226; *Reade v. Commercial Ins. Co.*, 3 Johns. 352. It is true that in the case of *Liebart v. The Ship Emperor*, Bee, Adm. 339, 344, the bond was given to consignees, and pronounced invalid, and that on appeal the court said: "No authority is shown, and none can be shown, because none ought to be, that an hypothecation can be made to a consignee; great mischiefs might arise if captains could hypothecate to consignees." But these remarks are to a great degree *obiter*, for there were special circumstances in the case which were relied on, which would have doubtless rendered the bond invalid, even if it had been given to a stranger. That a bond may be given to a consignee there can be no doubt. See *The Ship Lavinia v. Barclay*, 1 Wash. C. C. 49; *Ross v. Ship Active*, 2 Wash. C. C. 226. In *Rucher v. Conyngham*, 2 Pet. Adm. 307, the court said: "The facts of this case, in a great degree, if not entirely, supersede the necessity of discussing the question of the propriety of a consignee taking a bottomry bond from the master, in virtue of the power given him merely as master. I will only say, that in general, I think there is a legal impropriety and invalidity in such bonds. The practice may lead to abuses and collusions, to charge the owner with unwarrantable and unnecessary usurious premiums. But I will not say that there may not be cases, where the consignee is not bound, more than any other lender, to advance for repairs, without taking the ship as security for a loan on maritime interest. A consignee not in the habit of dealing with or crediting an owner, and not having any goods, funds, or means of security at the time, seems not under any obligation to risk his property, without the usual and adequate compensation and security." In England, in the case of *The Alexander*, 1 Dods. 278, a bond given to the consignees of the cargo was pronounced valid. So in *The Nelson*, 1 Hagg. Adm. 169, where it was given to the consignee of the cargo, and the agent of the charterer, the consignee of the ship being at the port but refusing to advance funds. See also *The Lord Cochrane*, 2 W. Rob. 320. Lord *Stowell*, in the case of *The Hero*, 2 Dods. 139, 144, states the law as follows: "I will not take upon myself to lay it down as an universal proposition, that an agent may not, under any circumstances, take the security of a bottomry bond. Cases may possibly arise in which an agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed, and if he finds it unsafe to extend credit to his employers beyond certain reasonable limits, he may then surely be at liberty to hold hard, and to say, I give up the character of agent, and as any other merchant might, to lend his money upon bond, to secure its payment, with maritime interest. If in such a case, he gives fair

unusual care and vigilance in ascertaining that there was a sufficient necessity for the loan, and entire good faith in the transaction. If these are found to exist, then we must say that such a bond may be valid, or that a consignee must advance his own funds without the interest or security any other person would be entitled to, for which there is no law, or else that a consignee who is willing to save a ship on fair terms, must let her perish, because he cannot be treated as well as a stranger. Perhaps it should be shown that the master, or other agent, could not raise money on the same terms from another party; and, with better reason, the consignee might lose his remedy on the bond if it could be shown that the funds might have been raised on better terms from another. He should be held to all the strict accountability of an agent;<sup>1</sup> but if everything which good faith could require

notice that he will not make any further advances as agent, and affords the master an opportunity of trying to get money elsewhere, and the master is unable to do so, but is obliged to come back to him for a supply, then he is fairly at liberty, like any other merchant, to advance the money on a security that is more satisfactory to himself. I will not say that the case might not go further. If the agent had given credit for all the disbursements of the ship, and found, contrary to his expectations, that they amounted to more than he calculated, and went beyond any advances which he might reasonably be called upon to make on the mere personal credit of his employers, and if there was no time to look to other quarters for assistance, he might possibly be justified in resorting to this species of security, giving the earliest notice of the necessity under which he acted. Under such circumstances he might not, perhaps, be out of the reach of the protection which a bottomry bond would afford him." And Dr. *Lushington*, in the case of *The Oriental*, 3 W. Rob. 243, 2 Eng. L. & Eq. 546, uses language no less strong. He says: "That an agent cannot, under any circumstances, take a bond of bottomry upon the vessel in whose service he is employed, is a proposition which cannot, I conceive, be universally maintained. There can be no obligation upon a merchant, merely because he takes upon himself the character of agent, to advance to any required extent his own funds for the repairs and outfit of a vessel consigned to his charge. It forms no part of the contract into which he enters when he becomes an agent, that he should make such advances, and it must rest with himself to judge of the prudence of so doing, according to the circumstances in which the vessel is placed." Though this case was reversed on appeal, yet it was on another ground. *Wallace v. Fielden*, 7 Moore, P. C. 398. See also *The Nuova Loanese*, 22 Eng. L. & Eq. 623.

<sup>1</sup> This is well illustrated by the late case of *The Royal Stuart*, 2 Spinks, Adm. 258, 33 Eng. L. & Eq. 602. The agents for the vessel at Australia, put on board, for England, a quantity of damaged flour. All parties believed that it might be safely conveyed without risk to the ship, or those in it. But it became heated before the

were in the case, we do not know why the bond might not be valid, even if the consignee had appointed the master who made it.<sup>1</sup>

We should answer the question, whether a valid bottomry bond may be made to a charterer, in the same way. Such a bond would be open to suspicion, and would require the most careful scrutiny; but would be valid if wholly unimpeached.<sup>2</sup> It is, however, decided on good authority, and for good reason, that a bottomry bond to a part-owner, which binds the shares of the ship belonging to the other owners to payment with extra interest for repairs, is not valid.<sup>3</sup>

## SECTION IX.

### A BOND MAY BE GOOD IN PART AND VOID IN PART.

A bottomry bond may be given for a sum of money composed of several items, for a part of which such a bond may lawfully be given, and for a part of which it may not be given. The bond

vessel left port and was necessarily relanded. The agents also supplied the ship with necessaries for the homeward voyage, and advanced a large sum of money to the master. They then took a bond covering the cost of supplies, the expense of re-landing the flour, and the money advanced to the master. The bond was admitted, but on reference to the registrar and merchants, the charges for relanding the flour, and the amount of money advanced to the master, were disallowed. The case came before the court on a motion to confirm the report of the registrar. It was held that the agents had no right to ship their own property on board, which from its nature might be dangerous, and then, when it became so, charge the owner with the expense of relanding it. Dr. *Lushington* said: "It must be remembered always that this is a bond taken by the agent of the ship, whose duty it is to protect the ship from all improper charges; and though it is true in law that an agent may take a bottomry bond, yet when he does so, all the transactions thereto appertaining require the utmost vigilance of the court, for the obvious reason, that when the agent and lender are blended in one, the owner is deprived of the protection expected from a paid agent." In regard to the money, there was no evidence that it was wanted by the master, and the court therefore held that as the lender was bound to see that a necessity existed, the bond was so far invalid. In *Clark v. The Bark Leopard*, U. S. D. C., Mass., 4 Law Reporter, 153, the libellant, who was also the consignee of the vessel, employed her on various voyages, without accounting for the earnings, and in other respects acted fraudulently, and it was accordingly held that he could not recover.

<sup>1</sup> See *ante*, p. 140, n. 4.

<sup>2</sup> *Breed v. The Ship Venus*, U. S. D. C., Mass. Abbott on Shipping, Am. Ed. 159, note.

<sup>3</sup> *Patton v. The Schooner Randolph*, Gilpin, 457.

will then be good *pro tanto*; for it seems to be quite well settled that it may be good in part and void in part.<sup>1</sup> If many claims are added together to make up the amount for which the bond is given, a court in which enforcement of it is sought, will analyze these claims, requiring them to be severally proved; and will decree in favor of those only, or that part of the bond only, which is sustained by sufficient proof and is not open to objection.<sup>2</sup> It is doubtful whether courts of common law have this power; we think they have not.<sup>3</sup>

## SECTION X.

### OF THE HYPOTHECATION OF THE FREIGHT.

A bottomry bond which hypothecates the ship does not, of necessity, hypothecate the freight also.<sup>4</sup> But the master has the same power over the freight that he has over the ship, and may hypothecate the freight under the same circumstances, for the same reasons, in the same way, and by the same bond.<sup>5</sup> And a general hypothecation of the freight by the master in a foreign port, will be construed to include all the freight of the whole voyage, whether

<sup>1</sup> The *Augusta*, 1 Dods. 283; The *Hero*, 2 Dods. 139; The *Tartar*, 1 Hagg. Adm. 1; The *Nelson*, id. 169, 176; The *Heart of Oak*, 1 W. Rob. 204, 214; The *Ocean*, 10 Jur. 504; *Dobson v. Lyall*, 3 Mylne & C. 453, n., 8 Jur. 969; The *Royal Stuart*, 2 Spinks, Adm. 258, 33 Eng. L. & Eq. 602; *Smith v. Gould*, 4 Moore, P. C. 21; The *Brig Hunter*, Ware, 249; The *Ship Packet*, 3 Mason, 255, 259; The *Virgin*, 8 Pet. 538; The *Brig Bridgewater*, Olcott, Adm. 35, 37; *Furniss v. The Brig Magoun*, Olcott, Adm. 55.

<sup>2</sup> The *Aurora*, 1 Wheat. 96. See also cases in preceding note, and The *Osmali*, 3 W. Rob. 198, 219. In this case Dr. *Lushington* stated that he was not prepared to say that in all cases where a small amount of the sum claimed is properly a subject of bottomry, and the larger proportion of the demand is not properly the subject of a bond, that the court would be under the necessity of pronouncing for that smaller amount. Such a practice might lead to fraud, inconvenience, and litigation.

<sup>3</sup> See The *Hero*, 2 Dods. 139, 147; The *Ship Packet*, 3 Mason, 255, 259.

<sup>4</sup> *La Constancia*, 4 Notes of Cases, 285; The *Mary Ann*, 4 Notes of Cases, 376, 383, 10 Jur. 253. See also The *Draco*, 2 Sumner, 157; *Crawford v. The Wm. Penn*, 3 Wash. C. C. 34.

<sup>5</sup> The *Gratitudine*, 3 Rob. Adm. 240, 274; The *Nelson*, 1 Hagg. Adm. 169; The *Augusta*, 1 Dods. 283; *Murray v. Lazarus*, 1 Paine, C. C. 572; The *Ship Packet*, 3 Mason, 255. See also cases in subsequent notes.

earned at the time the bond is made or not,<sup>1</sup> provided it has not been paid to the master or owner.<sup>2</sup>

## SECTION XI.

### OF THE CONSTRUCTION OF A BOTTOMRY BOND.

A bottomry bond is preferred to any other lien whatever,<sup>3</sup> excepting only the lien of the seamen for wages;<sup>4</sup> and the lien of

<sup>1</sup> The Schooner *Zephyr*, 3 Mason, 341. In *The Jacob*, 4 Rob. Adm. 245, the freight of a subsequent voyage, was, under the circumstances of the case, held liable for the bond. The freight is liable to contribute *pro ratâ* with the ship, although the ship and freight belong to different persons. The *Dowthorpe*, 2 W. Rob. 73. And freight earned from sub-shippers of goods by permission of the charterers of the whole ship, is liable, as against them, in payment of a bottomry bond given at the port of the charterers, for advances subsequent to the charter-party. The *Eliza*, 3 Hagg. Adm. 87.

<sup>2</sup> The *John*, 3 W. Rob. 170. See also *The Cynthia*, 20 Eng. L. & Eq. 625.

<sup>3</sup> The *Mary*, 1 Paine C. C. 671; *The Duke of Bedford*, 2 Hagg. Adm. 294, 304; *The Mary Ann*, 9 Jur. 94; *The Orelia*, 3 Hagg. Adm. 75, 83; *The Hersey*, 3 Hagg. Adm. 404, 407; *The Wm. F. Safford*, Lush. Adm. 69. See also cases *ante*, p. 138, note 2. In the case of *The Aline*, 1 W. Rob. 111, a collision occurred, and the vessel, to the negligence of whose crew the collision was owing, put into Cowes for repairs. Application was made to D., a merchant of that port, for assistance in procuring the necessary repairs. D. declined unless the master would issue a bottomry bond for such sums as might be expended. This the master agreed to do. D. had no knowledge of the claim against the vessel. Part of the repairs were made prior to the arrest of the vessel for the damage done by the collision, and part subsequent. The court having pronounced the vessel in fault, she was sold by order of court, and the proceeds paid into the registry. D. having intervened for his claim, the question came before the court as to which claim should be preferred. Held, that D. was entitled to priority only to the extent of the increased value of the vessel arising from the repairs. The vessel in this case had not left Cowes when she was arrested, and no bond had been executed. The decree, therefore, is to be taken in connection with all the circumstances of the case; and Dr. *Lushington* expressly said that he could not hold that, universally, bonds given for repairs must give way to prior claims of damage.

<sup>4</sup> The *Madonna D'Ibra*, 1 Dods. 37, 40; *The Sydney Cove*, 2 Dods. 1, 13; *The Constanca*, 4 Notes of Cases, 512, 10 Jur. 845, 850; *The Louisa Bertha*, 1 Eng. L. & Eq. 665; *Blaine v. Ship Charles Carter*, 4 Cranch, 328; *The Virgin*, 8 Pet. 538; *The Hilarity*, 1 Blatchf. & H. Adm. 90; *Furniss v. The Brig Magoun*, Olcott, Adm. 55, 66. In *The Selina*, 2 Notes of Cases, 18, it was held that wages earned antecedently to a salvage service would not be entitled to priority,

material men for repairs or supplies indispensable to her safety.<sup>2</sup> The reason of this rule is, that a bottomry bond saves the ship; for it is to be presumed that it was made from a strict necessity; and if it had not been made the other liens on it would have been worthless. The reason of the exception is, that the bottomry bond itself would never have brought the ship within reach of any persons having an interest in or a lien upon her, had she not been navigated home by the seamen. So, too, if there be several bottomry bonds on the same ship, the last takes precedence, and a latter over a former, on the same ground that it is the last which saved the ship.<sup>3</sup> And if a bottomry bondholder discharges the

And in *The Mary Ann*, 9 Jur. 94, Dr. *Lushington* is reported to have said: "Suppose the wages sued for had been, in part, wages on the outward voyage, before the bottomry bond was taken; then would arise a question of no small importance, namely, whether these wages would be entitled, as against the ship, to priority over the bottomry bond. I apprehend not." But in the subsequent case of *The Louisa Bertha*, 1 Eng. L. & Eq. 665, where there were several voyages, the court held that the lien of the seamen for their wages extended to all the voyages, they serving under a continuous contract. In *The Wm. F. Safford*, Lush. Adm. 69, a person who had paid the crew their wages by direction of the master, was allowed to stand in their place, and his claim was given precedence over a bottomry bond.

<sup>2</sup> *The Jerusalem*, 2 Gallis, 345. See also *Ex parte Lewis*; id. 483.

<sup>3</sup> *The Exeter*, 1 Rob. Adm. 173; *The Sydney Cove*, 2 Dods. 1; *The Eliza*, 3 Hagg. Adm. 87; *The Trident*, 1 W. Rob. 29; *Leland v. The Medora*, 2 Woodb. & M. 113; *Furniss v. The Brig Magoun*, Olcott, Adm. 66; Code de Commerce, book 2, tit. 9, art. 323. In the case of *The Betsey*, 1 Dods. 289, the first bond was given on the 12th of March, and on the 17th of the same month, more money being required, another bond was given to another party. The preference was given to the latter bond, although there was so slight a difference as to date, and although the bonds were executed at the same place, and the money was lent on the same voyage and on the same risk. In *The Constancia*, 4 Notes of Cases, 285, there were three bonds. The first and third were on the ship alone, and the second on the cargo alone. The first and second were of the same date. The court held, that the two on the ship should be paid out of the proceeds of the ship alone. But though the second was on the cargo alone, yet the ship and freight were primarily liable for it, and what remained of the proceeds of the ship should be first applied to the payment of it, then the freight, and lastly, the cargo. So in *The Trident*, 1 W. Rob. 29, where there were four bonds, Dr. *Lushington* said: "I also take it to be clear, that in a case where there are several bonds, and one is secured on the ship and freight, and another upon the ship, freight, and cargo, according to every principle of equity, and this court sits as a court of equity, I am bound to marshal the assets, and say you shall satisfy your claim from the cargo, and you yours from the ship and freight." This *dictum* is now, however,



demands of the seamen for their wages, he perhaps stands as assignee of their claims, and has their lien for wages, in connection with his own.<sup>1</sup> It may be doubted, however, whether the principle of novation does not apply so far as to require the assent of the owner, or some security to protect his interests.<sup>2</sup> If the lender had, under the same necessity and to liberate the ship, repaid advances made for indispensable repairs or supplies, he could include them in his claim.<sup>3</sup>

For the reason that a bottomry bond is supposed to have saved the ship, it is construed very liberally by all courts, and if possible the intention of the parties is carried into effect.<sup>4</sup> At the same time, because they are made from necessity, or, as is sometimes said, are creatures of necessity and distress,<sup>5</sup> they are very carefully watched, and, while the lender is protected against any formal or technical objections if he has acted in good faith, the

overruled. In *The Priscilla*, Lush. Adm. 1, there were three bonds. The first on the ship and freight, the second on the ship and cargo, and the third on the ship, freight, and cargo. Held, that the third bond was to be paid out of the ship and freight, and that the second was to be paid out of the same fund, and, as the first bond did not cover the cargo, it was not liable at all. This privilege of priority is confined to bonds given under necessity in a foreign port.

<sup>1</sup> *The Virgin*, 8 Pet. 538, 553; *The Kammerhevie Rosenkrants*, 1 Hagg. Adm. 62. But see *The Adolph*, 3 Hagg. Adm. 249. In *The Cabot*, Abbott, Adm. 150, it was held that the bondholder had the right to pay the wages and stand in the place of the seamen, but that he could not exact of them a formal assignment of their wages, nor the payment of his proctor's fees; and on an offer to satisfy their wages he could not require them to defer the prosecution of their demands until he should choose to institute a suit on the bond.

<sup>2</sup> See Dr. *Lushington's* remarks in the case of *The John Fehrman*, 20 Eng. L. & Eq. 648.

<sup>3</sup> See *Miller v. The Snow Rebecca*, Bee, 151.

<sup>4</sup> *Simonds v. Hodgson*, 3 B. & Ad. 50; *The Alexander*, 1 Doda. 278; *The Rhadamanthe*, id. 201; *The Hero*, 2 id. 139; *The Calypso*, 3 Hagg. Adm. 162; *The Reliance*, id. 66, 74; *The Schooner Zephyr*, 3 Mason, 341; *Pope v. Nickerson*, 3 Story, 465, 486. In *The Jacob*, 4 Rob. Adm. 245, 249, Lord *Stowell* said: "The disposition of this court would certainly be to uphold the efficacy of bonds of this nature, as far as is consistent with law. They are bonds of great sanctity, and highly necessary in mercantile affairs, and, therefore, the court would be inclined to support them, as far as the justice of the case will admit." See also *The St. Catherine*, 3 Hagg. Adm. 250, 253; *Smith v. Gould*, 4 Moore, P. C. 28; *The Mary Ann*, 10 Jur. 253, 4 Notes of Cases, 376.

<sup>5</sup> *The Kennersley Castle*, 3 Hagg. Adm. 1, 7.

ship-owner is also protected against oppression.<sup>1</sup> Admiralty courts are especially disposed to apply to all questions which come before them on contracts of bottomry, principles and considerations of equity.<sup>2</sup> Thus, although there is no precise limit to what is called maritime interest, and in some cases a very large percentage is allowed,<sup>3</sup> yet if it be apparent and certain that the lender took advantage of the borrower's necessities to make him pay for the money far more than it was worth, a court of admiralty will interfere, and reduce the interest within proper bounds.<sup>4</sup> It has been

<sup>1</sup> In *The Vibilia*, 1 W. Rob. 1, 5, Dr. *Lushington* said: "Before, however, entering upon the discussion of circumstances peculiar to this case, it may be not unadvisable to consider what is meant by that *dictum* so often cited, and again urged in this cause, that bottomry bonds are of a high and sacred character. All legal engagements, all contracts sanctioned by the law, are sacred; that is, they are to be enforced by every court of law and equity; the expression, therefore, so often repeated must, I think, have some other meaning more appropriate and peculiar to the subject itself, than merely to denote the character which a bottomry bond enjoys in common with other legal instruments. I may also further observe, that this expression, so often quoted, cannot refer to priority of payment, for of that, when the bond is admitted to be valid, no doubt is ever entertained. The only meaning which, with satisfaction to my own mind, I can attach to this observation, is, that where once the transaction is proved to have been clearly and indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit beyond question, and the bond in all essentials apparently correct, then that under such circumstances the strong presumption of law is in favor of its validity, and it shall not be impugned save when there shall be clear and conclusive evidence of fraud: or where it shall be proved beyond all doubt, that, though purporting in form to be a bottomry transaction, the money was in truth and in fact advanced upon different considerations." See also *Greely v. Smith*, 3 Woodb. & M. 236, 257; *The Mary Ann*, 4 Notes of Cases, 378.

<sup>2</sup> See *The Cognac*, 2 Hagg. Adm. 377, 388; *The Trident*, 1 W. Rob. 29, 35; *The Heart of Oak*, id. 204, 215; *Packard v. The Sloop Louisa*, 2 Woodb. & M. 48, 60.

<sup>3</sup> See *ante*, p. 135, note 1.

<sup>4</sup> *La Ysabel*, 1 Dods. 273; *The Zodiac*, 1 Hagg. Adm. 320, 326; *The Cognac*, 2 Hagg. Adm. 377; *The Boddington's*, 2 Hagg. Adm. 422; *The Heart of Oak*, 1 W. Rob. 204, 215; *The Lord Cochrane*, 2 W. Rob. 320, 336; *The Hunter, Ware*, 249; *The Ship Packet*, 3 Mason, 255, 260; *Wilmer v. The Smilax*, 2 Pet. Adm. 295, note. In England the practice is for the court to refer the items for which the bond was given, together with the premium, to the registrar and merchants. *La Ysabel*, *supra*; *The Lord Cochrane*, *supra*. When their return is made, the court has the power to allow the original interest if they have diminished it, or to still further diminish it, but in such cases it will act with great caution and take

held, that if the voyage is defeated before the marine risk has begun to run, only legal interest can be allowed.<sup>1</sup> So, too, while the lien of the lender is preserved very carefully, and goes with the ship unharmed through great distances and during long periods, yet when the lender can enforce and realize this lien he should do so. Voluntarily to permit the ship to voyage about the world with this unrecorded and secret lien on her, exposes innocent purchasers to great danger. It is, therefore, either a fraud on the part of the lender, or a carelessness which has the effect and does the work of fraud. It is, therefore, held, that the bond does not create any absolute interest in the ship, nor give an indissoluble lien; and if the lender delays enforcing it for an unreasonable time and without reasonable cause, and a third person, by purchase or levy, acquires the vessel without knowledge of the lien, the lender will be held to have waived and lost his lien; otherwise, not.<sup>2</sup>

If a bottomry suit has been commenced and then abandoned, Lord *Stowell* has expressed himself as very reluctant to sustain another suit on the same bond.<sup>3</sup> This reluctance would probably be felt by our admiralty courts; but would certainly be removed by any evidence explaining satisfactorily the abandonment of the former suit.

into consideration the peculiar circumstances of the case. The *Zodiac*, *supra*; The *Cognac*, *supra*.

<sup>1</sup> *Greely v. Smith*, 3 Woodb. & M. 236. See also 3 Kent, Comm. 357.

<sup>2</sup> *Blaine v. The Ship Charles Carter*, 4 Cranch, 328; *Wilmer v. The Smilax*, 2 Pet. Adm. 295, note; *The Rebecca*, 5 Rob. Adm. 102. See also *The Sydney Cove*, 2 Dods. 1, 7; *Leland v. The Ship Medora*, 2 Woodb. & M. 92, 105; *The Brig Draco*, 2 Sumner, 157, 191; *The Brig Nestor*, 1 Sumner, 73, 85; *The Barque Chusan*, 2 Story, 455, 468. See also cases *ante*, p. 133, notes 1 and 2.

<sup>3</sup> *The Fortitudo*, 2 Dods. 58. In *The Kalamazoo*, 9 Eng. L. & Eq. 557, a ship was arrested in a cause of collision and the damage pronounced for. Subsequently, it being ascertained that the damage to the cargo was to a greater extent, a new action was commenced, and the ship again arrested. Held, that this new action could not be maintained.

## SECTION XII.

## OF A RESPONDENTIA BOND.

As the master may make a bottomry of the ship, so either a part or the whole of the cargo may be hypothecated by him, if necessary.<sup>1</sup> If the goods are hypothecated by the master abroad, this is usually done by a respondentia bond. This instrument, although sometimes in the form of a bill of sale, is usually in the form of a bond, and is almost the same thing in respect to the goods which a bottomry bond is to the ship.<sup>2</sup> And like that it may be made by the owner of the goods at home, without any necessity, either before or during a voyage; and it may be so made to take up a former bond; and it is not necessary that the money so raised by respondentia on the goods should be expended in the purchase of them or in any way about them.<sup>3</sup> If made by the master, it can only be made from necessity, and undoubtedly all the law and the rules in reference to this necessity would be the same as in a case of bottomry.<sup>4</sup> A bond cannot be given to include the cargo until it is actually on board.<sup>5</sup>

A loan on respondentia is a loan on maritime interest; it must therefore not only be a loan which is secured by the goods on their safe arrival, but one which puts both the principal and interest at risk, and gives the lender no claim for any payment what-

<sup>1</sup> See cases in note *supra*, also *The Lord Cochrane*, 1 W. Rob. 312, 2 id. 320; *The Osmanli*, 3 W. Rob. 198, 214; *Justin v. Ballam*, 1 Salk. 34.

<sup>2</sup> *The Gratitude*, 3 Rob. Adm. 240, 260; *The Osmanli*, 3 W. Rob. 198, 214; *The Nostra Senora del Carmine*, 29 Eng. L. & Eq. 572. The master has no authority to give a bond on the cargo alone. If he does, the ship and freight are first liable, and then the cargo, because it is the same as if he had given a bond on the ship, freight, and cargo. *La Constancia*, 4 Notes of Cases, 285. And where a bond was given on the ship and cargo, it was held that the freight was also liable. *The Prince Regent*, cited 2 W. Rob. 83; *The Priscilla*, Lush. Adm. 1.

<sup>3</sup> *Conard v. Atlantic Ins. Co.* 1 Pet. 386; *Franklin Ins. Co. v. Lord*, 4 Mason, 248.

<sup>4</sup> See *ante*, cases on bottomry bonds. In many instances the owners of the cargo are the only parties who oppose the bond. See *The Bonaparte*, 3 W. Rob. 298, 1 Eng. L. & Eq. 641.

<sup>5</sup> *The Edmond*, Lush. Adm. 57, per Dr. *Lushington*.

ever if the goods be lost.<sup>1</sup> In practice the goods are also transferred to the obligee by an indorsement and delivery of the bills of lading, as collateral security; and this gives to the obligee a constructive possession of the goods.<sup>2</sup>

A bond of bottomry upon "the ship and freight" was held to bind them only, and to exclude the cargo, although in the recital of the same bond, it was said that the master was compelled to take up money "on the said schooner, her cargo and freight."<sup>3</sup>

If a portion of the cargo be pledged by *respondentia*, it has a right of contribution for the purpose of redemption against the rest of the cargo; and it is said that the court would be inclined to enforce this right against the other shippers, and not turn the party over to his remedy against the owner alone. But this must depend on circumstances. It might be a case in the nature of general average, and then all the interests benefited should contribute. But if, as would generally be the case, the ship was bound to carry the goods, and thereby earn her freight, and a part of the cargo

<sup>1</sup> In *Franklin Ins. Co. v. Lord*, 4 Mason, 248, the bond was given on the cargo to secure the sum of ten thousand dollars loaned upon the outward and the homeward cargoes of the vessel from Boston to Copenhagen and back. The vessel and cargo were totally lost upon the homeward passage. There was a clause in the bond that upon both voyages the vessel was to have on board the amount lent in goods. At the time of the loss she had only goods to the amount of nine thousand dollars on board. The lenders claimed to recover the whole amount, on the ground that the having goods to the value specified was a condition precedent. But it was held that they could recover only the difference between the amount lent and the amount on board.

<sup>2</sup> In *Johnson v. Greaves*, 2 Taunt. 344, the master of a ship detained as a prize, and libelled in the prize court at Jamaica, gave bills of lading of the cargo to a person who became bail for the ship and cargo there. The court held that the master had no authority to contract that the cargo should be sold in London, and the proceeds remitted back to Jamaica, the owners being ready to give a sufficient security to indemnify the bail in London. Blackstone, in his *Commentaries*, vol. 2, p. 458, says that when money is lent upon the cargo only the borrower is liable, and the lender has no claim against the goods. And the very obscure case of *Busk v. Fearon*, 4 East, 319, may seem to confirm this remark. But it is absurd to say that money is lent upon a cargo, if it gives no lien on the cargo; and the whole law of *respondentia* would be defeated by such a rule. At most it can go no further than that a contract gives no lien on the cargo when it is plain that the cargo is to be sold free from all lien, and the return cargo, which had no existence when the bond was made, cannot be subjected to the lien.

<sup>3</sup> *The Schooner Zephyr*, 3 Mason, 341.

was pledged for money to enable her to do this, the ship would be responsible in the first place, and the rest of the cargo would contribute only in case the ship could not be made to pay. For whatever other shippers contributed, they too could recover from the ship.<sup>1</sup>

### SECTION XIII.

#### SOME SPECIAL RULES IN REGARD TO BOTTOMRY BONDS.

In payment of a bottomry bond where all the interests are bound, the assets are to be marshalled. In the first place the property of

<sup>1</sup> *Alers v. Tobin*, October 30th, 1802, before Lord *Ellenborough*, C. J., Abbott on Shipping, 372; *Duncan v. Benson*, 1 Exch. 537, 3 Exch. 644; *Pope v. Nickerson*, 3 Story, 465. In *Hallett v. Wigram*, 9 C. B. 580, an action of *assumpsit* was brought by a shipper against the owner of the ship to recover damages for the sale of a portion of a quantity of copper ore, shipped on a voyage from Adelaide in Australia, to Swansea in South Wales. After having sailed, the vessel met with a storm, and was obliged to put back to Adelaide for repairs. To pay for these repairs a portion of the cargo was sold. The plea stated that the vessel met with a storm, and was obliged to put back, that repairs were necessary to enable her to deliver her cargo, and that no other ship could be obtained to take on the cargo, and that the master was unable by bottomry, hypothecation, or otherwise than by such sale to raise the money necessary for the repairs, and that the ship when repaired was not worth the cost of repair. To this plea the plaintiff demurred, and the demurrer was sustained. The court held that the injury which obliged the vessel to put back not being itself a subject of general average, the expenses consequent thereon should not be compensated for by all the parties in interest, but must fall upon the ship-owner. In answer to the argument that the repairs were solely for the benefit of the cargo, because when put on the ship they cost more than the ship was worth, it was said by the court that the plea merely stated that the expense was greater than the value of the ship, and not, than the value of the ship and freight. They also held that the ore was a species of property which would not deteriorate by being kept, even if no other ship could be obtained at that time, but this, they said, did not appear by the plea, for the cargo consisted of other goods than the plaintiff's, and the plea merely stated that no other ship could be obtained to carry on the cargo, and not that none could be found to take the *plaintiff's goods*. There are also similar decisions in this country. *Hassam v. St. Louis Perpet. Ins. Co.* 7 La. Ann. 11; *The Gold Hunter*, 1 Blatchf. & H. Adm. 300; *The Boston*, id. 309, 330; *Am. Ins. Co. v. Coster*, 3 Paige, 323. But the shipper whose goods are sold is not entitled to claim from the ship-owner the price which they might have realized at the port of delivery, unless the ship arrives. An averment of the arrival of the ship is therefore necessary. *Atkinson v. Stephens*, 7 Exch. 567, 14 Eng. L. & Eq. 407.

the owner of the ship will be applied. Then, the money of the master, or perhaps his other property, before the goods of shippers.<sup>1</sup> In making up the decree, the sum lent, together with the marine interest up to the time when the bond is payable, constitutes the principal, and legal interest is to be added to this from that time to the time of the decree.<sup>2</sup>

Although the last bottomry has a preference over all former ones, yet if the property will not pay all, and they are really concurrent, the parties being equally interested and on equal terms, they will be paid *pro rata*, although the different bonds may bear different actual dates.<sup>3</sup>

A bottomry bond in admiralty is generally regarded as a negotiable instrument or interest, which being transferred in good faith and for consideration, may be put in force by the holder in his own name.<sup>4</sup>

By the English statute of 7 Geo. 1, ch. 21, § 2, contracts made by English subjects upon loans by way of bottomry on ships in the

<sup>1</sup> The Ship Packet, 3 Mason, 255, 267. Both ship and freight are liable before the cargo, and this is true, although the bond is given on the cargo alone. The *Constancia*, 4 Notes of Cases, 285. For the way the court will marshal the assets when there are several bonds, one on ship and freight, and another on ship, freight, and cargo, see The *Trident*, 1 W. Rob. 29, and other cases cited, *ante*, p. 161, n. 3.

<sup>2</sup> The Ship Packet, 3 Mason, 255, 267; *Furniss v. The Brig Magoun*, Olcott, Adm. 55, 66; The *Ship Panama*, id. 342, 352. In England, it would seem that the practice is to allow interest only on the bond, and not on the bond and interest. Marshall on Ins. b. 2, ch. 4, p. 752. Mr. Arnould, however, is of opinion that the law as laid down by Mr. Justice Story in the case above, is now the law of England. 2 Arnould, Ins. 1840. No authority is cited for this, and the practice seems to be the other way. See The *Cognac*, 2 Hagg. Adm. 377, 393; The *St. Catharine*, 3 Hagg. Adm. 250. After judgment, interest is not allowed unless the losing party occasion unnecessary delay. The *Exeter*, 1 Rob. Adm. 173. In The *New Brunswick*, 1 W. Rob. 28, it was held that where the legal holders of a bond reside out of the country, and have no agent there, interest will be decreed only from the time of the arrival of a power of attorney authorizing the receipt of the principal.

<sup>3</sup> The *Exeter*, 1 Rob. Adm. 173, 176; La *Constancia*, 4 Notes of Cases, 512, 518.

<sup>4</sup> The *Rebecca*, 5 Rob. Adm. 102, 104; The *Prince of Saxe Coburg*, 3 Hagg. Adm. 387, s. c. *Soares v. Rahn*, 3 Moore, P. C. 1; The *Osmanli*, 3 W. Rob. 198; The *Mary Ann*, 4 Notes of Cases, 379. The Code de Commerce, art. 313, 314, provides that a bond payable to order may be negotiated like any other commercial instrument, but the guaranty of payment by indorsement does not extend to the maritime interest, unless it is expressly so stipulated.

service of foreigners, designed to trade within the limits of the East India Company's charter, were made void.<sup>1</sup> And by 19 Geo. 2, ch. 37, § 5, loans on bottomry upon ships belonging to English subjects, bound to or from the East Indies, were required to be made only on the ship and cargo, and to be so expressed in the bond.

In England courts of equity, as well as courts of admiralty, exercise jurisdiction over bottomry bonds.<sup>2</sup>

It may be added, that if a bond is obtained from the master by duress, it is of course void ; but the fact that he was under duress at the time it was executed, does not prove that the bond was obtained by duress.<sup>3</sup> And a payment of money in order to prevent the obligee in a bottomry bond from enforcing the same by taking possession of the vessel, is a voluntary payment which, although the money demanded is not due, does not give the debtor a right of action to recover it back, even if he declares at the time of payment, that he makes it under coercion, and intends to reclaim the money by action, a threatened lawsuit not being considered as a duress.<sup>4</sup>

If the bond contains such clauses as are proper to mortgages ; as that the master "grants, bargains, and sells the ship, with the usual proviso, that on payment of the money it is to be void," this does not prevent it from being a bottomry bond, if the maritime risk is incurred.<sup>5</sup>

<sup>1</sup> This statute is held to be repealed by implication. *The India, Brow. & L. Adm.* 221.

<sup>2</sup> *Glascott v. Lang*, 8 Sim. 358, 3 Mylne & C. 451 ; *Dobson v. Lyall*, 3 Mylne & C. 453, note ; *Duncan v. M'Calmont*, 3 Beav. 409.

<sup>3</sup> *The Heart of Oak*, 1 W. Rob. 204 ; *The Gauntlet*, 3 W. Rob. 82.

<sup>4</sup> *Forbes v. Appleton*, 5 Cush. 115.

<sup>5</sup> *Robertson v. United Ins. Co.* 2 Johns. Cas. 250.



## CHAPTER VII.

## OF THE USE OF THE SHIP BY THE OWNER.

## SECTION I.

## OF THE CARRIAGE OF GOODS ON FREIGHT.

A SHIP, as the great instrument of commerce, may be regarded as of great importance, not only to its immediate owner, but to the community; and the public policy or general expediency of promoting and assisting the profitable use and employment of the ship, in the commercial interchange of commodities between distant nations, has a considerable effect upon the law of shipping. It is probable that the system of liens hereafter spoken of, and many of the duties and rights of the owner and master of the ship, on the one hand, and of the shippers of goods on the other, if they do not arise from this policy, are nevertheless affected by it, and owe to it whatever modifications cause them to differ from what they would be under the ordinary rules of the law of contracts.

The owner sometimes uses his own ship, and sometimes lets it out to others, who use it. We will begin by considering the use he makes of it himself.

He may carry his own merchandise, or that of others, or both. The word "freight" has several meanings. Beawes defines it as "the sum agreed on for hire of a ship, entirely or in part, for the carriage of goods."<sup>1</sup> This is now the usual meaning of this word in law. In common conversation, however, it often means also the goods carried. And that this was, if not its original meaning, one of its early meanings, is certain from a case in 1620,<sup>2</sup> the report of which begins, "Action of covenant brought upon a covenant made by the merchant with a master of a ship, that, if he would

<sup>1</sup> Beawes, *Lex Mercatoria*, 118.

<sup>2</sup> *Bright v. Cowper*, 1 Brownl. & G. 21.

bring *his freight* to such a port, he would pay him such a sum." Now, however, it means the sum to be paid for such carriage, and also the sum which might be payable therefor.<sup>1</sup> For, if a ship-owner carries his own goods only, he may insure his freight *eo nomine*, meaning what another would have paid him for carriage of the same goods on the same voyage; or he may include it in a valuation of his ship or of his cargo.<sup>2</sup>

It may be remarked in the outset, because the principle lies at the basis of the law of freight, that the ship and the cargo have reciprocal rights against each other, and reciprocal liens to enforce the rights of each against the other. The ship-owner undertakes and promises to carry in his ship the goods of the shipper to their destined port in safety, by the proper route, and in due season. This implies a promise that his ship is seaworthy in all respects, that it has a sufficient master and crew,<sup>3</sup> who will take due care of the goods as to lading them on board, carrying and delivering them, and who will navigate the ship to her destined port in the usual way, without unnecessary delay or deviation.<sup>4</sup> And if there

<sup>1</sup> In *Robinson v. Manufacturers' Ins. Co.* 1 Met. 143, 145, *Shaw, C. J.* said: "The term freight is somewhat equivocal, and has several meanings. It is sometimes used to describe the compensation for the carriage of goods, sometimes for the hire of a vessel, and sometimes it is used in a loose sense to signify the goods or property carried. It is never, however, used in the latter sense, when intended to describe a separate subject of insurance; but is then used in contradistinction to ship and cargo, to designate the compensation to be paid to the ship-owner for the use of his vessel, either for the carriage of merchandise, or for the hire of the vessel, in whole or in part." See also *Adams v. Penn. Ins. Co.* 1 Rawle, 97, 106.

<sup>2</sup> *Flint v. Flemming*, 1 B. & Ad. 45; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429; *Clark v. Ocean Insurance Co.* 16 Pick. 289. So, under the statute of 1851, c. 43, § 3, limiting the liability of ship-owners to the value of the ship and freight, it has been held that the term "freight" includes the earnings of the vessel in transporting the goods of her owners. *Allen v. Mackay*, 1 Sprague, 219.

<sup>3</sup> *The Sch. Sarah*, 2 Sprague, 31.

<sup>4</sup> What amounts to a deviation, and what circumstances will excuse it, we have treated of in our work on Insurance. We speak of it here only so far as it bears upon the relation existing between the owner of the ship and the freighter. Much must be left to the discretion of the master of a vessel in determining the necessity of a deviation from the course of a voyage, the port of distress, and the time of remaining in such port. *The Sch. Sarah*, 2 Sprague, 31. In *The Mary Hawes*, U. S. D. C. Mass. *Lowell, J.*, fish were shipped from Gloucester, Massachusetts, to New York. The voyage is usually one week or less, and the vessel

be a failure in any of these particulars, and the goods are thereby injured or lessened in their value to their owner, the ship-owner

was three weeks on the way. There was nothing in the winds or weather to account for this delay. It appeared that the master remained some time in the town of Harwich, to report to the provost-marshal and arrange for a substitute, he having been drafted in the army. The libellants assented to the stopping, but it was agreed that the vessel should be sent on at once under the charge of the mate or some other person. This was not done and the vessel was held liable for the injury to the fish caused by the delay. It is well settled, that, if the vessel deviates, and the cargo is insured, the risk terminates, and the underwriters are exonerated. It follows, as a necessary consequence, that the ship-owner having put an end to the contract existing between the freighter and the underwriter, should stand in the place of the latter, and assume his risks. But a question has arisen, whether the freighter is bound to show not only that the vessel deviated and the goods were subsequently lost or damaged, but also that the loss occurred in consequence of the deviation. In *Souter v. Baymore*, 7 Barr, 415, a contract was entered into for the exclusive use of the ship for a specified voyage. The master, however, put into an intermediate port, and took a deck-load of wood. After the vessel sailed from this port, she encountered a storm, and the cargo was damaged. The master brought an action for his freight in one of the State courts of Pennsylvania, and the damage done to the goods was set up in defence. It was contended, that, as the master deviated unnecessarily, he was liable for any subsequent loss during the voyage, and that, as the contract was for the exclusive use of the vessel, the taking of the deck-load made the owner responsible as an insurer, but the court held that he was only liable for the damage occasioned by the deviation or breach of the contract, and that he was entitled to his freight without any deduction. Although we think it clear that the owner was entitled to the freight, if the consignee accepted the goods, yet a deduction should have been made for the damage done to the cargo. After the suit was commenced in the State court, but before trial, the shipper brought an action in the District Court of the United States against the ship to recover for the damage done to the cargo. *Knox v. The Ninetta, Crabbe*, 534. And it was held, that, by the deviation, the captain became an insurer, and the ship was liable for any subsequent loss. This we consider to be the well-settled rule of law. *Davis v. Garrett*, 6 Bing. 716; *Freeman v. Taylor*, 8 Bing. 124; *Parker v. James*, 4 Camp. 112; *Hand v. Baynes*, 4 Whart. 204; *Crosby v. Fitch*, 12 Conn. 410; *Bond v. The Cora*, 2 Pet. Adm. 373, 379, 2 Wash. C. C. 80; *Walsh v. Homer*, 10 Mo. 6; *Powers v. Davenport*, 7 Blackf. 497.

In *M'Andrew v. Adams*, 1 Bing. N. C. 29, a charter-party was entered into on the 20th of October, by which the owner of the ship agreed to go in ballast from Portsmouth to St. Michael's, and bring back a cargo of fruit direct to London. The charterer was to be allowed thirty-five running days for loading and unloading, to commence on the first of the next December, and if the vessel did not arrive at St. M. by the 31st of January of the next year, the charterer was to be at liberty to rescind the charter-party. It was held that the ship-owner was bound to send the ship at once to St. Michael's, and was not at liberty to make an

is responsible, and the ship itself is subjected to the lien of the shipper of the goods, in order that he may enforce his rights, or obtain indemnity for a violation of them.<sup>1</sup> And this lien is not

intermediate voyage for his own purposes, notwithstanding he arrived there before the 31st of January. In *Nichols v. Tremlett*, 1 Sprague, 361, the charter-party represented the vessel to be lying in the harbor of Boston. It appeared by the evidence that she was in point of fact at Searsport in Maine, undergoing repairs, and was detained for that purpose some days. The action was brought for demurrage at the port of loading, and it was contended that none was due, because, this deviation having taken place, it was said to be impossible to ascertain whether there would have been any, or if any, how much, detention beyond the rightful lay-days, if the libellant had used due diligence and arrived at the proper time. But the evidence on this point being very full, the court were of opinion that if the vessel had sailed immediately, she would have arrived at the port of loading on a certain day, and at that time, as there was not a full supply of the merchandise which she was to carry ready for shipment, a delay of a certain number of days would have happened, and for that the respondent was liable. An intention to deviate is not sufficient. *Hobart v. Norton*, 8 Pick. 159. Usage to deviate may be shown. *Lowry v. Russell*, 8 Pick. 360; *Thatcher v. McCulloh*, Olcott, Adm. 365. In *Dunseth v. Wade*, 2 Scam. 284, 289, it is said that: "If a common carrier attempts to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods, and cannot avail himself of any exceptions made in his behalf in the contract." So, where goods are carried on deck without the knowledge of the shipper. See *post*, ch. 7, § 8, n. So if goods are to be sent by a specified ship, and they are sent by another, this is a breach of the contract, and makes the ship-owners liable as insurers. *Bazin v. Richardson*, U. S. C. C. Penn. 20 Law Reporter, 129, 5 Am. Law Register, 459. If a contract is made to take goods by a sailing vessel, and they are taken by steam, it is a deviation. *Merrick v. Webster*, 3 Mich. 268. So if they are to be taken by steam and are taken by a sailing vessel. *Wilcox v. Parmelee*, 3 Sandf. 610. So if the carrier delivers the goods at a wrong wharf, although they are destroyed by an excepted peril. *Steamboat Sultana v. Chapman*, 5 Wis. 454. See also, as to the effect of a deviation on the contract of bottomry, *ante*, p. 137, n. 2, and on the contract of seamen, *post*, ch. 14, § 9, n.

<sup>1</sup> *Cleirac*, *Us et Coustumes de la Mer*, 72. *Abbott*, in his treatise on Shipping, 127, is of the opinion that in England the court of admiralty has no jurisdiction to enforce the lien against the ship in such a case. See also *Birley v. Gladstone*, 3 M. & S. 205; *Gladstone v. Birley*, 2 Meriv. 401. In this country, the existence of the lien is not only fully recognized, but it can be enforced by process *in rem* in admiralty. *The Gold Hunter*, 1 Blatchf. & H. Adm. 300; *The Boston*, id. 309; *The Grafton*, Olcott, Adm. 43, 1 Blatchf. C. C. 173; *The Rebecca Ware*, 188; *The Waldo*, Daveis, 161; *The Brig Casco*, id. 184; *The Sch. Volunteer*, 1 Sumner, 551; *Clark v. Barnwell*, 12 How. 272; *Rich v. Lambert*, id. 347. And every contract of the master, entered into within the usual scope of his authority, binds the vessel to the fulfilment of it. *The Paragon*, Ware, 322; *The Phebe*, id. 263; *Hewett v. Buck*, 17 Maine, 147. In the case of *The Druid*, 1 W.

waived by the consignee accepting the goods and signing a receipt specifying that they have been received in good order; but to constitute a waiver there must be an acknowledgment of the injury and an intention to abandon a remedy, or some contract which is inconsistent with the existence of the lien.<sup>1</sup> On the other hand, if the goods are so carried, the owner of the goods is bound to pay to the owner of the ship the freight earned by the carriage, and the ship-owner has a lien on the goods to enforce his rights against them.<sup>2</sup> And if the goods are once laden on board, the ship-owner

Rob. 391, 399, Dr. *Lushington* used the following language in reference to a lien on the ship: "In all causes of action which may arise from circumstances occurring during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship, and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible, and *vice versâ*, no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against." See also *The Bold Buccleugh*, 3 W. Rob. 220, 231, 2 Eng. L. & Eq. 536, 540. We have seen that if the charterers have the entire control of the vessel, and the master is their agent, the general owners are not personally liable for a breach of a contract entered into by the master with a third party. The question then arises, Is there any remedy against the vessel, or is it confined to the personal liability of the charterers? The language used by Dr. *Lushington*, above, must be confined to the case then before him, and is not susceptible of a general application. In *The Druid*, the action was *in rem* against a vessel for damages caused by a collision, occasioned by the wilful tort of the captain. The court held that as the owners would not be personally liable in such a case, the vessel was not. See *The Ida*, 1 Lush. Adm. 6. It is now settled that a vessel is liable *in rem* for a breach of a contract made by a master within the scope of his employment, although he be appointed by the charterer. *The Phebe*, Ware, 263; *The William & Emmeline*, 1 Blatchf. & H. Adm. 70, 71; *Sch. Freeman v. Buckingham*, 18 How. 182; *Thomas v. Osborn*, 19 How. 22. And in *Jackson v. The Julia Smith*, 1 Newb. Adm. 61, 6 McLean, C. C. 484, it was held that where the possession of the vessel is not tortious, but under color of right, a contract of affreightment made with the master would bind the vessel. But for acts not within the scope of his employment, the owners are not personally liable, nor is the ship. See *post*, p. 187, n. 3.

<sup>1</sup> *Steamboat Robert Morris v. Williamson*, 6 Ala. 50.

<sup>2</sup> That the ship-owner, and the master, as his agent, have a *lien* on the goods carried in their ship for the freight, is a proposition which appears never to have been disputed. *Molloy*, Lib. 2, c. 4, § 12; *Beawes*, *Lex Mercatoria*, Tit. Freight, 118; *Jacobsen*, *Sea Laws*, 261; *Anonymous*, 12 Mod. 447; *id.* 511; *Artaza v. Smallpiece*, 1 Esp. 23; *Sodergreen v. Flight*, cited 6 East, 622; *Wilson v. Kymer*,

has a completed right to carry them the whole distance; nor can the shipper reclaim them and take them out of the ship (unless

1 M. & S. 157; *Mitchell v. Scaife*, 4 Camp. 298; *Hutton v. Bragg*, 2 Marsh. 339, 345, 7 Taunt. 14, per *Gibbs*, C. J.; *Faith v. East India Co.* 4 B. & Ald. 630; *Christie v. Lewis*, 2 Brod. & B. 410, 5 Moore, 211; *Lucas v. Nockells*, 4 Bing. 729; *Campion v. Colvin*, 3 Bing. N. C. 17, 3 Scott, 338; *Lane v. Penniman*, 4 Mass. 91; *Lewis v. Hancock*, 11 Mass. 72; *Cowing v. Snow*, 11 Mass. 415; *Pickman v. Woods*, 6 Pick. 248; *Clarkson v. Edes*, 4 Cow. 470; *Chandler v. Belden*, 18 Johns. 157; *Van Bokkelen v. Ingersoll*, 5 Wend. 315; *Lander v. Clark*, 1 Hall, 355, 374; *Holmes v. Pavenstedt*, 5 Sandf. 97; *Jordan v. James*, 5 Ohio, 88; *Fernandez v. Silva*, 1 La. 269; *Palmer v. Gracie*, 4 Wash. C. C. 110; *Gracie v. Palmer*, 8 Wheat. 605; *Ruggles v. Bucknor*, 1 Paine, C. C. 358; *Drinkwater v. The Brig Spartan*, Ware, 149; *The Sch. Volunteer*, 1 Sumner, 551, 569; *Certain Logs of Mahogany*, 2 Sumner, 589, 601; *Perkins v. Hill*, 2 Woodb. & M. 158. But respecting the true character and origin of this lien, the same unanimity by no means exists. On the one hand, it is supposed by Mr. Justice *Ware* to exist by the custom of merchants, and to be derived from the rule of the maritime law. "The general right of the master and owner to retain the merchandise for the freight due upon it, he says, "has not been denied. It is too well established to admit of doubt. It is a principle of the general maritime law, the common law of the commercial world, sanctioned by all the maritime codes, ancient and modern, and confirmed by numerous decisions of the highest courts, both in this country and England. Nor does there appear to be any difference in principle, nor is any recognized in law, whether the merchant takes the whole vessel by a charter-party, or sends his goods in a general ship. The lien of the owners is as perfect for the hire of the vessel stipulated in the charter-party, as it is for the freight stipulated in the bill of lading. In both cases the claim is privileged in the same degree and to the same extent." *Drinkwater v. The Brig Spartan*, Ware, 149, 155.

The rule of the maritime law, here alluded to, is thus given by Cleirac: "Le batel est obligé à la marchandise, et la marchandise au batel." See Cleirac on the 21st Art. of the *Jugemens d'Oleron*. *Roccus* declares, in his treatise "*De Navibus et Naulo*," Not. 87, "*Naulum solvi debet via exequutiva, ex mercibus conductis, vel a domino ipsarum*," (upon the accomplishment of the voyage, the freight is to be paid out of the merchandise carried, or by the owner of the same,) and further on in Not. 88: "*Naulum conventum solvendum est infra dies octo, decurrendos a die quo navis pervenerit ad portum destinatum pro exoneratione mercium et magister navis non potest compelli ad consignationem mercium, quousque naulum sibi non solvatur; imo antequam exonerentur merces, naulum est solvendum; nisi aliter convenerit dominus mercium cum navis magistro.*" (The freight agreed upon is to be paid within the eight days following the day upon which the ship reached the port designed for the discharge of the goods, and the master cannot be compelled to deliver over the goods in so far as the freight is not paid to him; indeed the freight is to be paid before the goods are discharged, unless the owner has otherwise agreed with the master.)

The *Ordonnance de la Marine*, Lib. 3, Tit. 1, Art. 11, declared, that, "Le navire,

by his consent), without paying to the owner either his full freight,

ses agrès et appareils, le fret et les marchandises chargées, seront respectivement affectés aux conventions de la charte-partie." (The ship, rigging, etc., the freight and the goods laden shall be respectively bound to the conditions of the charter-party.) On which Valin remarks: "The privilege granted by this article is to be understood respectively and distributively, that is to say, that the goods of the shipper are specially liable to the payment of the freight," "nam et ipsum nautum potentius est," says the Law, 6, § 1, "qui potiores in pignore." According to the same author, this privilege did not empower the master to detain the goods on board if the freight was not paid, but when they had been discharged, he might prevent their transportation or take possession of them in the lighters or the storehouse, or even after they had reached the consignee, provided he did so within fifteen days, and before their transfer to a third party. The provision of the ordinance has been modified by the Code de Commerce, Art. 306, under which the master is entitled to cause the goods to be deposited in a warehouse, while the freight is paid, subject to the same conditions as before.

From the language of the earlier English writers on commercial law, it certainly appears as if they considered the rule of the English law to be derived from these sources. Molloy says, *De Jure Maritimo*, Lib. 2, c. 4, § 12, "The lading of the ship in construction of the law is *tacitly* obliged for the freight, the same being in point of payment preferred before any other debts to which the goods so laden are liable, though such debts as to time were precedent to the freight, for the goods remain, as it were, *bailed* for the same."

So Beawes, in his *Lex Mercatoria*, 118, remarks: "Freight must be paid in preference to all other debts for whose payment the goods stand engaged, but as those are responsible to the ship for her hire, so is the ship to the owner of the goods," etc. And Abbott, p. 284-286, seems to incline towards this view, although he speaks vaguely of the liens depending in cases where it is not created by special contract, *on some general principle*, without specifying what principle. Indeed, the origin of the lien in question does not appear to have been ever discussed by the English courts. See also *Chandler v. Belden*, 18 Johns. 157, 162, per *Spencer*, C. S. "The right to retain the cargo for the freight has grown out of the usage of trade."

But it is to be remarked, that, although derived from the maritime law, the lien, as known to the courts of Great Britain and America, is clearly not a maritime lien, properly speaking. It is not a "privilegium," a privileged claim upon the goods, following them wherever they go, like the reciprocal lien which binds the ship by the maritime law to answer for the destruction of the goods. It is not so considered, we have seen, by the continental writers, who speak merely of the master's right to retain the goods for his freight, whilst the *Ordonnance de la Marine* merely allows him to resume the possession against the original consignee, and within fifteen days; and Chancellor Walworth expressly distinguishes it therefrom. "The right of the master to retain the freight money, after it has come into his possession, for a general balance against the owner, and his lien upon the cargo to compel payment of the freight, as the agent, and acting in behalf of the owner, are frequently mentioned in the reports, and are sometimes

or compensation for any trouble or loss sustained by him. How

confounded with the lien or claim of the master on the freight, as against the owner, before it has been actually received from the shipper. *The two first are in the nature of common-law liens; and if the master part with the money in the one case, or the possession of the goods in the other, the lien is gone; but the lien on the freight, as such, by the maritime law, which is now under discussion, is incidental to, or a consequence of the lien upon the ship; and it may be enforced in the same manner, by a proceeding in rem in the admiralty courts. It is not strictly a lien, or mere right to retain possession of the subject until payment of the debt charged thereon, but it is the privilege of the civil law, or an equitable lien which may be enforced, although the claimant never was in the actual possession of the subject, out of the proceeds of which satisfaction is sought.*" *Van Bokkelin v. Ingersoll*, 5 Wend. 315, 325.

This opinion of the learned chancellor is in strict accordance with the vast majority of the cases, from the early anonymous one in 12 Mod. 511, down to those of the present day.

It may be this common-law character of the ship-owner's lien on the goods for his freight, the fact that it appears to consist in a mere right to detain them as a security for payment, which has induced the courts and text-writers in some instances to make the same depend not on the maritime, but on the policy of the common law. This has been usually done by identifying it with the lien of the common carrier, from which it would result that the lien must be confined to such ship-owners as fall within the denomination of common carriers, whereas Lord Holt expressly stated in an early case, *Anonymous*, 12 Mod. 447, that every master of a ship was entitled to it (in the absence of any agreement to the contrary). It is true that ship-owners and masters engaged in carrying the goods of others for them are usually styled common carriers by the courts, without distinction, a proposition which, although constantly reiterated, we shall hereafter have occasion to contest. See Whitaker on Liens, 95; Cross on Liens, 287; Pinney v. Wells, 10 Conn. 104; *Gracie v. Palmer*, 8 Wheat. 605, 632.

It is a little singular that in this last case Mr. Justice Johnson, in another part of his decision, gives a somewhat different definition of this lien; he says, p. 635: "On what principles rests the general lien of the ship on the goods for freight? The master is the agent of the ship-owner to receive and transport; the goods are improved in value by the cost and cares of transportation. As the bailee of the shipper, the goods are in the custody and possession of the master and ship-owner, and the law will not suffer that possession to be violated until the laborer has received his hire."

This appears to us a ground on which to rest the ship-owner's lien, entirely distinct from his character as a common carrier. The principle here advocated applies as forcibly to the case of a private carrier as a common carrier, and is indeed the application to the case of carriers of another species of lien, that which every bailee who, by his labor and skill, has conferred value upon a specific chattel bailed to him, possesses on it, for his stipulated reward. See *M'Intyre v. Carver*, 2 Watts & S. 392; *Forth v. Simpson*, 13<sup>th</sup> Q. B. 680; *Morgan v. Congdon*, 4 Comst. 551.



far the obligation of the shipper extends seems, however, not to be

In a case before Judge *Sprague*, the question came up whether the lien was lost by delivery of the goods, it being contended that, as the lien was maritime, it did not in any degree depend on possession; but the learned judge held, that, although the lien for freight was a maritime lien, yet the ship-owner could not proceed against the goods *in rem* after the master had delivered them, although they had not been sold. *Sears v. Certain Bags of Linseed*, U. S. D. C. Mass., 1858. An appeal was taken, and the case argued before Mr. Justice *Clifford*, in June, 1858, and the decision of *Sprague*, J. was affirmed. In our comments upon this case in 1 *Parsons, Marit. Law*, 146, we remarked: "This case suggests to us what may be the true way of reconciling the decisions with the unquestioned principle that the lien of the ship on the goods should be reciprocal with that of the goods on the ship. The lien on the goods may be a maritime lien and yet be lost by delivery. Even the most favored lien, that of a seaman for his wages, is lost by a delay to enforce it; and a lien may be waived as we have seen in the preceding note; and it may well be a presumption of law that the act of the master in delivering up the goods is to be considered as a waiver of his lien. But if it be a maritime lien, which it certainly is in our judgment, we should say that if the circumstances attending the delivery were such as to show no intent on the part of the master to relinquish his lien, he should still have it, though the burden would be on him to show this fact." This view has since been sustained by *Taney*, C. J., in giving the decision of the court in this case on appeal to the Supreme Court of the United States. The decree of the Circuit Court was affirmed on the ground that the goods were delivered without any condition or qualification, and it was said that where goods are put in the warehouse by the consignee, under an agreement or understanding that the act shall not be a waiver of the lien, or if there is a local usage of the port to this effect, the goods may be held by a process *in rem*. *Bags of Linseed*, 1 *Black*, 108. See also *Sears v. Wills*, 4 *Allen*, 212; *Lane v. Old Colony R.* 14 *Gray*, 143. The true nature of a maritime lien was ably set forth in *Harmer v. Bell*, 7 *Moore*, P. C. 267, 22 *Eng. L. & Eq.* 62. See also *The Betsey & Rhoda*, *Daveis*, 112, and articles on the "Peculiarities of Maritime Liens," 15 *Law Reporter*, 555, *London Law Magazine*, November, 1852; 16 *Law Reporter*, 1, *London Law Magazine*, February, 1853. In 151 *Tons of Coal*, 4 *Blatchf. C. C.* 368, it is held that a delivery made under an agreement that the freight will be paid at the time, is not such a delivery as parts with the lien. The ship-owner is free to waive his lien and resort to his personal remedy against the owner of the goods, if he thinks proper. *Shatzell v. Hart*, 2 *A. K. Marsh.* 191. And it was held in a Louisiana case, that a master who refused to deliver the goods on other grounds than the non-payment of the freight, thereby lost his right to avail himself of the want of tender. *Fernandez v. Silva*, 1 *La.* 269, 274. It has been decided in England, that the ship-owner has no lien for dead freight on goods carried; that is, for the freight which is due for the unoccupied portion of the ship. *Birley v. Gladstone*, 3 *M. & S.* 205; *Philips v. Rodie*, 15 *East*, 547. See *Kerford v. Mondel*, 5 *H. & N.* 931.

settled by the authorities.<sup>1</sup> A carrier, however, has no lien for his

<sup>1</sup> It is said in *Curling v. Long*, 1 B. & P. 634, that before the ship breaks ground the ship-owner has no lien for freight; but notwithstanding this case, it is now well settled, that, as soon as he has the goods on board, and perhaps as soon as he has taken charge of them, he has a right to retain them and carry them on. There seems, however, to be some conflict of authority in regard to the right of the master to demand anything more than a compensation for the trouble and expense he has been put to in consequence of having to unload the goods. Thus in *Clemson v. Davidson*, 5 Binn. 392, 401, Mr. Justice *Brackenridge* says: "It has been made very clear to me, that the ship-owner had no lien on the goods put on board, beyond the compensation for the taking on board, the stowage, unshipping, and putting on the wharf again, and the demurrage to her sailing which this might occasion, this being before he broke ground." These remarks are *obiter*, the controversy being between two other parties, both of whom were willing to send on the goods. See also *Burgess v. Gun*, 3 Harris & J. 225. In *Keyser v. Harbeck*, 3 Duer, 373, the master of a vessel gave written receipts to the owner of goods delivered on board, and on these receipts being given up, issued a bill of lading in good faith to the party returning them, who had obtained them by false pretences from the shipper. It was held that the captain was not liable in trover to the shipper, unless the bills of lading were surrendered, or fully indemnified against, and all damages consequent upon the delay necessary to unload them and all expenses of loading and unloading them were paid. Lord *Tenterden*, in his treatise on Shipping, p. 595, states the law as follows: "A merchant who has laden goods cannot insist upon having them relanded and delivered to him, without paying the freight that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him." In *Tindal v. Taylor*, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210, the Court of Queen's Bench cite the above passage with commendation, and Lord *Campbell* says: "It is argued that there can be no lien on the goods for freight not yet earned or due; but when the goods were laden, to be carried on a particular voyage, there was a contract that the master should carry them in the ship upon that voyage for freight; and the general rule is, that a contract once made cannot be dissolved except with the consent of both the contracting parties. By the usage of trade, the merchant, if he redemands the goods in a reasonable time before the ship sails, is entitled to have them delivered back to him on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them; but these are conditions to be performed before the original contract can be affected by the demand of the goods. It would be most unjust to the owners and master of the ship, if we were to hold that upon a simple demand at any time the goods must be delivered back in the port of outfit." See also *Thompson v. Small*, 1 C. B. 328, 354; *Thompson v. Trail*, 2 Car. & P. 334. In *Bartlett v. Carnley*, 6 Duer, 194, an action was brought by the master of a vessel against a sheriff for seizing and removing from his vessel certain goods under an attachment against the shipper, the plaintiff having executed and delivered to the shipper a bill of lading for

freight as against the owner of the goods, if he receives them from a wrong-doer, and carries them for him;<sup>1</sup> nor has he a lien in such a case even for the freight paid by him to a previous carrier, by whom the owner had directed them to be carried, the goods having been carried under a contract with the wrong-doer.<sup>2</sup> If, however, the goods are carried over a wrong route, owing to the mistake of the consignor or his agent, the carrier has a lien for his own charges and for all prior charges paid by him.<sup>3</sup>

The whole law of freight consists of little else than the application of the two general rules or principles already stated. They are of equal force and value; equally ancient and well established; and ought to be equally regarded and enforced in every court. But this is not the case in England, nor indeed in this country. There are obvious difficulties in the enforcement of the lien which the cargo has against the ship, in any court of common law, or even of equity.

the goods before the levy of the attachment. The court held that the plaintiff was entitled to recover, by way of damages, the freight on the goods, according to the rate stipulated, and the difference between the value of the goods which the plaintiff received after their return to him and the amount paid for the deficiency to the indorsees of the bill of lading, he being prevented from delivering them by the seizure. This question came before the Supreme Court of Massachusetts about the same time that *Tindal v. Taylor* was decided. *Bailey v. Damon*, 3 Gray, 92. The action was assumpsit on a contract whereby the defendants agreed to ship, and the plaintiffs to transport, a certain quantity of lumber to California for an agreed price. The lumber was put on board the vessel, but was afterwards taken away by the defendants. The plaintiffs then procured other merchandise, but at a less freight, and the ship finally sailed. In the court below, the judge ruled that the plaintiffs were entitled to recover the amount of freight and primage which they would have earned if they had taken the lumber to California, adding the demurrage for the time they were delayed to obtain other freight, and deducting the freight they received from other shipments of goods of other persons, and their net earnings on their own shipments. But the court *in banc* held that no freight was due before the commencement of the voyage, and no lien existed for it, and that the voyage did not commence till the ship broke ground. They also held that the plaintiff was entitled to recover full indemnity for the breach of the contract; but in determining this, the diligence used by the ship-owner in procuring another cargo, and the fact whether another voyage might not have been substituted which would have proved more beneficial, should be taken into consideration. A new trial was therefore ordered.

<sup>1</sup> *Robinson v. Baker*, 5 Cush. 137; *Clark v. Lowell R. Co.* 9 Gray, 231.

<sup>2</sup> *Stevens v. Boston & Worcester R. Co.* 8 Gray, 262.

<sup>3</sup> *Briggs v. Boston R.* 6 Allen, 246. See also *Nordmeyer v. Loescher*, 1 Hilton, 499.

But admiralty finds no difficulty. The hostility to admiralty in England abridged its power of enforcing this lien there, and at the same time the courts of common law devised no method of their own for doing the same thing with any completeness. Abbott, in his *Law of Shipping* (p. 284), says: "The right of the merchant who would seek to make this privilege available, ranks low in the order of precedence of privileged claims against the ship." He then enumerates a long list of these claims, and says, that "most of them are justly preferred to it." And then adds, "the privilege of the ship-owner against the goods for his freight is of a more beneficial character." But we apprehend that this opinion rests mainly upon the imperfect manner in which the common law of England has adopted the law merchant, and its very successful opposition to that system of judicature, the law of admiralty, which would have supplied all deficiencies. The lien of the ship on the cargo for the freight is fully as beneficial as he states it to be. But the lien of the cargo on the ship is, in this country, enforced in admiralty by process *in rem* as fully as any other maritime lien whatever. We defer speaking of it particularly until we treat of the Law of Admiralty; here only remarking, that it is enforced with us even against a subsequent purchaser of a vessel, either when he bought with a knowledge of the claim of the cargo, or when he bought so soon after the arrival of the ship that the owner of the cargo had no previous opportunity to enforce his lien.<sup>1</sup> It has, however, been recently decided that a sale of the vessel by the master through necessity, cuts off the lien of the shipper of cargo on the vessel.<sup>2</sup>

The owner of the ship carries only his own goods; or carries all of them that he chooses to send, and fills up his ship with the goods of others; or carries only the goods of others. And if he carries only the goods of others, he does this by offering his ship as a general ship, or letting her out by a charter-party.

If he offers his ship as a general ship, this is usually done by advertisement stating the name of the ship and of the master, the general character of the ship, the time of sailing, and the proposed voyage. An owner would not be bound to strict accuracy in all these particulars; but would be obliged to make compensation to

<sup>1</sup> The Rebecca, Ware, 188.

<sup>2</sup> The Amelie, 6 Wallace, 18.

a shipper who was injured, without his own fault, by a material misrepresentation in any of these particulars.<sup>1</sup> And, if the course

<sup>1</sup> See *The Zenobia*, Abbott, Adm. 80. The question has arisen in England whether an advertisement, that a vessel would sail with convoy, amounted to a warranty that she would so sail, or whether it merely meant that such was the intention. In *Runquist v. Ditchell*, 3 Esp. 64, the vessel was put up at the Royal Exchange as a general ship for Oporto, warranted to sail with convoy. She did not so sail, and was consequently lost. The court held that the ship-owners were liable. See also *Snell v. Marryatt*, in K. B. 48 Geo. 3, reported in Abbott on Shipping, p. 320; *Sanderson v. Busher*, 4 Camp. 54, note; and *Magalhaens v. Busher*, 4 Camp. 54. In these last two cases the stipulations in regard to convoy were inserted in the bills of lading. In *Runquist v. Ditchell*, it is stated in the report that the bill of lading contained the warranty in question. The court, however, decided the case on the ground that the advertisement amounted to an express stipulation; and in *Sanderson v. Busher*, *Gibbs, C. J.*, stated that the advertisement alone contained the clause in regard to convoy. See also *Freeman v. Baker*, 5 B. & Ad. 797. A case where the same principles are involved has been decided by the Court of Exchequer in England, *Cranston v. Marshall*, 5 Exch. 395. The plaintiff applied to the defendants, who were emigration agents, for a passage for himself and family to Australia. By a letter in reply, they agreed to take them for £65. The letter was written on a printed circular, which stated the times of the sailing of the vessels. One of them, the *Asiatic*, was to sail from London on the 15th of August, and from Plymouth on the 25th. A deposit of £32 10s. was paid. The ship did not sail from London till the 28th of August, nor from Plymouth till the 4th of September. On the 31st of August the plaintiff sailed from Plymouth in another vessel. The court said: "When parties by advertisement hold out that they are ready to give a written guaranty that a vessel shall sail on a particular day, and a contract is entered into specifically on that footing, in substance that is a warranty to sail on the day named." The question, however, in this class of cases is, what was the intention of the parties, and also, whether time was of the essence of the contract. Thus, in the case above cited, the defendants offered to give a written guaranty that the vessels would sail on such days. For this guaranty nothing extra was to be paid, and the court therefore held that this showed that the guaranty was given by the advertisement and the circular. In *Yates v. Duff*, 5 Car. & P. 369, the court left it for the jury to say whether time was of the essence of the contract, and, if not, whether the ship sailed within a reasonable time. See also *Glaholm v. Hays*, 2 Man. & G. 257; *Ollive v. Booker*, 1 Exch. 416. In *Cobb v. Howard*, 3 Blatchf. C. C. 524, it was assumed by Mr. Justice *Nelson*, that time was of the essence of the contract. The case was similar to *Cranston v. Marshall*, *supra*. The vessel did not arrive at the port from which the parties were to sail on the day named, being detained by stress of weather. The court held this to be no excuse, and said: "The contract bound the owner to have his vessel at the place and time designated; that he had stipulated for as a part consideration for the price paid, and assumed upon himself the responsi-

or ultimate destination of the ship were changed, it would be the duty of the ship-owner to notice the same in his advertisement, and vary that accordingly.<sup>1</sup>

## SECTION II.

### DELIVERY TO THE VESSEL.

The reception of the goods by the master on board of the ship, or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, or seeming to have this authority by the action or assent of the owners or master, binds the ship to the safe carriage and delivery of the goods.<sup>2</sup>

bility of performance; and the failure operated a breach of the engagement, and subjected him to a return of the price paid. The winds and weather are no excuse for the non-fulfilment of a contract as to the time of the commencement of the voyage. If these circumstances had been intended as elements of it, they should have been expressly provided for by the owner, and then all parties concerned would have understood it." See also *Denton v. Great Northern R.* 5 Ellis & B. 860, 34 Eng. L. & Eq. 154. In *Mills v. Shult*, 2 E. D. Smith, 139, an action was brought against the owner of a steamship for the breach of a condition set forth in a handbill in which the steamer was advertised to sail. It appeared in evidence that when the plaintiff went to buy his ticket he saw at the office a handbill, which stated that the steamer would sail *direct* for New York on a day mentioned. The handbill was signed by A & B as agents of the steamer, of whom also the plaintiff bought his ticket. The vessel sailed on the day mentioned, but did not proceed directly to New York, but stopped on the way to perform a salvage service, for which her owners were paid. The ticket bought by the plaintiff was recognized on board as a valid one. The court held that these facts were not sufficient of themselves to warrant the presumption that A & B were the agents of the steamer, and so authorized to bind the company. The correctness of this decision we are inclined to doubt.

<sup>1</sup> In *Peel v. Price*, 4 Camp. 243, *Gibbs*, C. J., said: "When a card has been published, advertising a ship for a specific voyage, if that be altered, I am of opinion that the owner is bound to give specific notice of the alteration to all persons who afterwards ship goods on board the vessel, and that he is otherwise answerable for the loss which they sustain by supposing that the destination of the vessel remains unaltered."

<sup>2</sup> In *Molloy*, b. 2, c. 2, § 2, the law is stated as follows: "And therefore so soon as merchandises and other commodities are put aboard the ship, whether she be riding in port, haven, or any other part of the seas, he that is *Exercitor navis* is chargeable therewith. In *Goff v. Clinkard*, cited in *Dale v. Hall*, 1 Wil-

## SECTION III.

## BILL OF LADING.

The bill of lading is a very ancient document, in general use among all commercial nations, and is much the same in its form

son, 281, an action was brought against a master of a ship who undertook to carry goods from London to Amsterdam. A puncheon of rum was delivered on board, and, while being let down into the hold, was staved. A verdict was rendered for the plaintiff, though the defendant proved that he endeavored to let it down with all possible care. See also *Morse v. Slue*, 1 Vent. 190; *Rich v. Kneeland*, Hob. 17; *Williams v. Peytavin*, 4 Mart. La. 304. In *Cobban v. Downe*, 5 Esp. 41, an action was brought against a wharfinger to recover the value of goods which had been delivered to the mate of a vessel by the wharfinger. Lord *Ellenborough* held, that, under these circumstances, the liability of the wharfinger had ceased, because that of the vessel had commenced. As soon as a delivery is made, the vessel is bound. *Faulkner v. Wright*, 1 Rice, 107; *Greenwood v. Cooper*, 10 La. Ann. 796; *Clarke v. Needles*, 25 Penn. State, 338; *Snow v. Carruth*, 1 Sprague, 324. In this last case the damage was done to the goods after they were delivered, but before the bills of lading were signed. See also *Greenwood v. Cooper*, 10 La. Ann. 796. Judge *Betts* has, however, in a recent case in the District Court of New York, held that a vessel is not liable *in rem* until the goods are on board, although they have been delivered to the officers of the vessel; *Dill v. The Bertram*, Ms. In support of this the following cases are cited. *The Sch. Freeman v. Buckingham*, 18 How. 182; *Vandewater v. Mills*, 19 How. 82; *The Young Mechanic*, 2 Curtis, C. C. 404; *The Kiersage*, 2 Curtis, C. C. 421. But, after a careful examination of these cases, we are entirely of the opinion that they do not support the principle contended for by Judge *Betts*, although there are dicta in some of them which seem to lead to such a conclusion; but the points actually decided are in every respect consistent with the law as stated in the text. See note 3, p. 187. In *The Bark Edwin*, 1 Sprague, 477, *s. c. nom.* *Bulkley v. Naumkeag Steam Cotton Co.* 24 How. 386, it appeared that at Mobile it is necessary for ships drawing a certain amount of water to lie below the bar and have their cargo brought down to them in lighters which are hired by the master of the ship for this purpose. It was held that a vessel was liable *in rem* for goods which had been delivered to the master for purposes of transportation, and lost on board the lighter. In *Trowbridge v. Chapin*, 23 Conn. 595, goods were delivered on board a steamer, which was a common carrier between New York and New Haven. The defendant proved that the clerk of the boat was the only person whose duty it was to receive freight and give receipts for it. The goods were taken on board by a porter, who testified that he saw but one man on board, who was either a deck hand, or one employed to sweep the decks. He told this man that he had goods for New Haven, and the man told him to put them down in a certain spot. He then left without making

and provisions in various countries;<sup>1</sup> and long and repeated adjudications have left but few open questions as to its effect. It is generally signed by the master, but it is not unusual in some of our commercial cities for the bill of lading to be signed and delivered in the counting-room of the owners, by a clerk of the owner. If he says, "A B, for C D, the master of said ship," the master would only be held if it were proved that he had given this authority, which, however, might be inferred from his knowledge and assent, or even knowledge and silence. Then the master and owners would be bound in the same way as if he signed it himself.<sup>2</sup> If the clerk says, "A B, for E F, etc., owners of ship,

any further inquiry. A majority of the court, consisting of three judges, held that, as the deck hand was not the agent of the boat for the purpose of receiving freight, the owners had incurred no liability. The Chief Justice and the remaining judge held that the porter had a right to presume that the man had been left in charge by the proper officers of the boat, and that the rule that where one of two innocent persons must suffer by the fraud of another, the loss shall fall on him who placed that person in a situation to commit the fraud, applied. They therefore were of opinion that the defendant should be held. The Chief Justice, in the course of his opinion, gives this illustration: "Suppose a quantity of freight had been shipped by the boat from New Haven to a merchant in New York, and a carman had taken it and carried it to the merchant's store, which he found open and no one in, or about it, except a man at work in the store, would not the carman be justified in leaving the goods deposited in the store, in the manner directed by the man at work?" The dissenting opinion pronounced by the learned Chief Justice seems to us to be better founded on principle and authority than the decision of the majority of the court, and the case does not appear to us to differ substantially from that of *Merriam v. Hartford R.* 20 Conn. 354. See also *Butler v. Hudson River R.* 3 E. D. Smith, 571; *Freeman v. Newton*, ib. 246; *Wells v. Wilmington R.* 6 Jones, 47.

The mere putting of the goods on the deck, without a delivery to some one on board is clearly not good. In *Wright v. Caldwell*, 3 Mich. 51, a distinction was taken between the delivery to be made by a passenger and by a freighter. A person intending to take passage on a steamboat brought his trunk on board and put it in the usual place for baggage, but did not deliver it to any one on board. Through mistake he did not take passage, and the trunk was lost. It was held that he must sue either in the character of passenger or freighter. That as passenger the delivery was good, but as he did not take passage he could not recover, and as freighter he had not made a good delivery. But if goods are put on board without the knowledge of those in command, and they afterwards receive freight for the goods, this is a ratification of the shipment. *The Huntress*, *Daveis*, 82.

<sup>1</sup> Pothier on Maritime Contracts, Cushing's Trans. p. 11, § 16; Beawes, *Lex Mercatoria*, 146.

<sup>2</sup> *Putnam v. Tillotson*, 13 Met. 517.



etc.," the owners would be bound on proof of authority, which would be inferred from knowledge and assent or usage.<sup>1</sup>

If a written receipt is given for the goods, the obligation is no stronger, but the receipt is *prima facie* and very strong evidence of the reception of the goods.<sup>2</sup> If, however, a bill of lading is given, this has an important influence over the rights and obligations of the parties.

It is now quite common for our railroad companies, and perhaps other carriers, to give a receipt closely resembling a bill of lading; but it is intimated in a recent English case that the bill of lading is properly a sea document, not applicable to land carriage, or inland carriages by water.<sup>3</sup> We do not know, however, any important consequences of or inferences from a bill of lading as used in shipping which might not belong to a similar document in case of land carriage, if the facts and circumstances were, in other respects, similar.<sup>4</sup> It is in substance the written acknowledgment of the master that he has received such goods as it describes, for the

<sup>1</sup> On the ground that the bill of lading must be signed by the master or by some one authorized by him, and must state by whom the goods are shipped, and where, and to whom they are to be delivered, the following instrument was held not to be a bill of lading: "Elmira, July 2, 1842, shipped on boat Occidental, H. Banks, captain, 52,900 feet white pine boards and plank, to Albany." This was signed by the agent of the consignor, and delivered to the captain. *Covill v. Hill*, 4 Denio, 323. See also *Wolfe v. Myers*, 3 Sandf. 7. But in *Dows v. Perrin*, 16 N. Y. 328, a bill of lading signed by the clerk of a canal boat line, in the name of the owners, was held a valid bill of lading. See also *Dows v. Greene*, 32 Barb. 502, 24 N. Y. 638; *Dows v. Rush*, 28 Barb. 157; *The Sch. Emma Johnson*, 1 Sprague, 527; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120.

<sup>2</sup> By the usual course of trade in England and in this country, the master or mate signs a receipt for the goods, at the time of the shipment, and delivers it to the shipper. The master should then be careful not to give a bill of lading till the receipt is given back to him. If he does, he will render himself doubly liable. *Beawes*, *Lex Mercatoria*, p. 127; *Abbott on Shipping*, 346; *Craven v. Ryder*, 6 Taunt. 434; *Bryans v. Nix*, 4 M. & W. 775; *Evans v. Nichol*, 3 Man. & G. 614; *Thompson v. Small*, 1 C. B. 328; *Gosling v. Birnie*, 7 Bing. 339; *Ruck v. Hatfield*, 5 B. & Ald. 632; *Hawes v. Watson*, 2 B. & C. 540; *Jones v. Bradner*, 10 Barb. 193; *Merc. Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Keyser v. Harbeck*, 3 Duer, 373. So if he gives two bills of lading for the same goods to different persons. *Stille v. Traverse*, 3 Wash. C. C. 43.

<sup>3</sup> *Bryans v. Nix*, 4 M. & W. 775. In New York, a bill of lading, given for goods to be transported by a canal, is called a commercial instrument. *Dows v. Greene*, 16 Barb. 72. See also *Grove v. Brien*, 8 How. 429.

<sup>4</sup> See preceding notes.

voyage stated, to be carried on the terms stated, and delivered to the persons specified in the bill.<sup>1</sup> It is a document of great force, and therefore should not be signed and delivered until the goods are actually received (and if only *signed*, but not *delivered*, it has no force),<sup>2</sup> nor should it contain any statements but those which are exactly accurate. If it be signed before the goods are received on board, or even before the shipper owns them or has bargained for them, it might nevertheless apply, as between the *master* and the *shipper*, to any goods shipped afterwards as and for those which are named in the bill of lading. But, in general, as the master has no authority to sign a bill of lading until the goods are received, such a bill would not bind his owners.<sup>3</sup> If there is a con-

<sup>1</sup> O'Brien v. Gilchrist, 34 Maine, 554; Wolfe v. Myers, 3 Sandf. 7; Ward v. Whitney, 3 Sandf. 399, 4 Seld. 442; Knox v. The Ninetta, Crabbe, 534; May v. Babcock, 4 Ohio, 334; Wayland v. Moseley, 5 Ala. 430; Dickerson v. Seelye, 12 Barb. 99.

<sup>2</sup> Buffington v. Curtis, 15 Mass. 528; Allen v. Williams, 12 Pick. 297; Graham v. Ledda, 17 La. Ann. 45. But in the case of The Peytona, 2 Curtis, C. C. 21, it has been held that an agreement for a bill of lading might bind the master, although none were signed or delivered.

<sup>3</sup> In Rowley v. Bigelow, 12 Pick. 307, Shaw, C. J., said: "The bill of lading acknowledges the goods to be on board, and, regularly, the goods ought to be on board before the bill of lading is signed. But if, through inadvertence or otherwise, the bill of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf ready to be shipped, or in the ship-owner's warehouse, or in the shipper's own warehouse, at hand and ready, and afterwards they are placed on board, as and for the goods embraced in the bill of lading, we think, *as against the shipper and master*, the bill of lading will operate on these goods by way of relation and by estoppel." The controversy in this case arose between the former owners of some corn, which was obtained from them by fraud, and the *bonâ fide* indorsees of a bill of lading given to the person thus obtaining the corn, and by him sent to the defendants. But the question arises whether if a captain sign bills of lading before the goods are on board, or delivered to some one authorized to receive them, and they are never shipped, the owners of the vessel are estopped from showing this fact in a suit brought against them for non-delivery by *bonâ fide* indorsees of the bill of lading. It is clear that they are not. It is a fraud on the part of the master to sign the bills before the goods are on board, and an act not within the scope of his authority as master. And the owners therefore are not liable. Lickbarrow v. Mason, 2 T. R. 63, 75, per Buller, J.; Grant v. Norway, 10 C. B. 665, 2 Eng. L. & Eq. 337; Hubbersty v. Ward, 8 Exch. 330, 18 Eng. L. & Eq. 551. See also Coleman v. Riches, 16 C. B. 104, 29 Eng. L. & Eq. 323. Nor, in such a case, is the vessel liable *in rem*. Sch. Freeman v. Buckingham, 18 How. 182; The Bark Edwin, 1 Sprague, 477.

tract to carry certain goods, and they are lost after coming into the possession of the master of the vessel, but before they are on board, and the master signs a bill of lading for them after the loss, although the owner may repudiate the bill of lading, yet he cannot at the same time set it up as merging the prior contract.<sup>1</sup>

Although the ship-owner may show that the goods were injured or destroyed on the passage by reason of some intrinsic defect which was not apparent when the goods were shipped, yet the bill is *primâ facie* evidence that they were at that time in the condition in which they are described as being in the bill itself.<sup>2</sup>

But this legal presumption cannot affect a third party.<sup>3</sup> As the bill of lading acknowledges the reception of the goods in good order, the burden of proof is on the carrier, on the damage or

<sup>1</sup> The Bark Edwin, 1 Sprague, 477.

<sup>2</sup> Nelson v. Woodruff, 1 Black, 156. In Hastings v. Pepper, 11 Pick. 41, an action was brought against the master of a vessel, to recover the value of a glass bottle containing twenty pounds of oil of cloves. The receipt of the box containing the bottle on board the vessel was acknowledged, but the defendant contended that the breaking of the bottle was owing to its being insufficiently packed, and that the bottle itself was imperfect, and not well annealed. *Shaw*, C. J., said: "It may be taken to be perfectly well established, that the signing of a bill of lading acknowledging to have received the goods in question, in good order and well conditioned, is *primâ facie* evidence, that, as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed, but was not apparent when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But in case of such loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier, and of course the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible." See also *Clark v. Barnwell*, 12 How. 272; *Cariss v. Johnston*, Ang on Carriers, § 213, n.; *Barrett v. Rogers*, 7 Mass. 297; *McIntosh v. Gastenhofer*, 2 Rob. La. 403; *Price v. Ship Uriel*, 10 La. Ann. 413; *Bissel v. Price*, 16 Ill. 408. In *Ellis v. Willard*, 5 Seld. 529, it was held that the statement in the bill of lading, that the goods were received in good order, would not prevent the carrier from showing that this was incorrect, and that it made no difference whether the goods were open to inspection or not. In *Benjamin v. Sinclair*, 1 Bailey, 174, the statement was held conclusive as to the *external* condition of the goods at the time of shipment. See also *Bradstreet v. Heran*, 2 Blatchf. C. C. 116; *Tarbox v. Eastern Steamboat Co.* 50 Maine, 389; *Gowdy v. Lyon*, 9 B. Mon. 112; *McIntosh v. Gastenhofer*, 2 Rob. La. 403; *Bissel v. Price*, 16 Ill. 408; *Hile v. Sturgeon*, 35 Misso. 212.

<sup>3</sup> *Brousseau v. Ship Hudson*, 11 La. Ann. 427.

non-delivery being shown,<sup>1</sup> to prove that the non-delivery or delivery in a damaged condition was owing to a cause for which he is not liable.<sup>2</sup> But if the bill of lading contains the clause "loss by breakage or leakage excepted," and the loss occurs by breakage or leakage, it seems that the burden is now on the shipper to prove negligence on the part of the carrier.<sup>3</sup> This clause means more

<sup>1</sup> To charge a carrier for the non-delivery of goods, some evidence of the non-delivery must be given. *The Falcon*, 3 Blatchf. C. C. 64.

<sup>2</sup> "After the damage to the goods, therefore, has been established, the burden lies upon the respondent to show that it was occasioned by one of the perils from which they were exempted by the bill of lading." Per *Nelson, J.*, in *Clark v. Barnwell*, 12 How. 272, 280. See also *Forward v. Pittard*, 1 T. R. 27; *Riley v. Horne*, 5 Bing. 217; *Hastings v. Pepper*, 11 Pick. 41; *Colt v. M'Mechen*, 6 Johns. 160; *The Huntress, Daveis*, 82; *Bell v. Reed*, 4 Binn. 127; *Clark v. Spence*, 10 Watts, 335; *Ewart v. Street*, 2 Bailey, 157; *Smyrl v. Nolon*, id. 421; *King v. Shepherd*, 3 Story, 349; *Turney v. Wilson*, 7 Yerg. 340; *Whitesides v. Russell*, 8 Watts & S. 44; *Dunseth v. Wade*, 2 Scam. 285; *Atwood v. Reliance Transp. Co.* 9 Watts, 87; *McIntosh v. Gastenhofer*, 2 Rob. La. 403; *Price v. Ship Uriel*, 10 La. Ann. 413; *Whitney v. Gauche*, 11 La. Ann. 432; *Ship Rappahannock v. Woodruff*, 11 La. Ann. 698; *Grieff v. Switzer*, 11 La. Ann. 324; *Bissel v. Price*, 16 Ill. 408; *Alden v. Pearson*, 3 Gray, 342, 348; *Graham v. Davis*, 4 Ohio State, 362; *Davidson v. Graham*, 2 Ohio State, 141; *M'Manus v. Lancashire R. 4 H. & N.* 327; *The Emma Johnson*, 1 Sprague, 527; *The Ship Zone*, 2 ib. 19; *Zerega v. Poppe, Abbott*, Adm. 397.

In the case of *The Ship Martha, Olcott*, Adm. 140, a quantity of sheet iron was found on delivery to be stained and rusted with wet. It was proved that the iron was well stowed, that the ship came in tight and dry, that the iron was taken on board in dry weather, and not exposed to the access of water. But the court held that this was not enough, for the burden was on the ship to show that the damage existed when the cargo was laden on board. In *English v. Ocean Steam Nav. Co.* 2 Blatchf. C. C. 425, the bill of lading contained the clause, "weight, contents, and value unknown." Goods in cases were on delivery found to be injured. Held, that the presumption was that they were properly packed in a fit state for transportation, unless there was something in their appearance or condition to afford ground for a contrary inference, or unless some evidence to that effect was given.

<sup>3</sup> *Ohrloff v. Briscall*, Law Rep. 1 P. C. 231; *Peninsular Steam Nav. Co. v. Shand*, 3 Moore, P. C. n. s. 272; *The Helene, Brow. & L.* 429; *Thomas v. Ship Morning Glory*, 13 La. Ann. 269; *The Brig May Queen*, 1 Newb. Adm. 464; *The Invincible*, U. S. D. C. Mass. 1868, *Lowell, J.* In *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 384, this was held to be the effect of a special agreement, which provided that the goods should be carried at the risk of the shipper. See, however, *Phillips v. Edwards*, 3 H. & N. 813; *Baker v. Brinson*, 9 Rich. 201; *Berry v. Cooper*, 28 Ga. 543; *Tardos v. Ship Toulon*, 14 La. Ann. 429; *Rochereau v. Ship Hansa*, ib. 431; *Roberts v. Riley*, 15 ib. 103.

than that the carrier is exempt merely from the ordinary breakage and leakage;<sup>1</sup> but it does not exempt him from loss owing to his negligence or that of his servants.<sup>2</sup> If the loss is shown to have been occasioned by an excepted peril, the shipper cannot recover unless he can show that the loss could have been prevented by the exercise of reasonable care and skill on the part of the carrier.<sup>3</sup>

A bill of lading has a twofold character, first, that of a receipt, and second, that of a contract. In a recent case in Massachusetts the following rules have been laid down to govern it in its character of a receipt. "First. The receipt in the bill of lading is open to explanation between the master and the shipper of the goods. Secondly. The master is estopped as against a consignee who is not a party to the contract, and as against an assignee of the bill of lading, when either has taken it for a valuable consideration upon the faith of the acknowledgments which it contains, to deny the truth of the statements to which he has given credit by his signature, so far as these statements relate to matters which are or ought to be within his knowledge. Thirdly. When the master is acting within the limits of his authority, the owners are estopped in like manner with him; but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually received on board."<sup>4</sup> So far as a bill of lading

<sup>1</sup> *Ohrloff v. Briscall*, Law Rep. 1 P. C. 231.

<sup>2</sup> *Phillips v. Clarke*, 2 C. B. N. S. 156, 5 ib. (Am. ed.) 881. See also *Hunnewell v. Taber*, 2 Sprague, 1. In *Edwards v. Steamer Cahawba*, 14 La. Ann. 224, the bill of lading contained this clause, "not accountable for leakage, rust, or breakage, if properly stowed." Held that the burden was on the carrier to show proper stowage.

<sup>3</sup> It was said in *Clark v. Barnwell*, 12 How. 272, 280, that if the ship-owner can prove that the loss was occasioned by an excepted peril, the shipper may still show that the loss might have been avoided by the exercise of reasonable skill and attention on the part of the carrier, but in such a case the burden of proving this would be on the shipper. And this was so decided in *Hunt v. Propeller Cleveland*, 1 Newb. Adm. 221, 6 McLean, C. C. 76.

<sup>4</sup> *Sears v. Wingate*, 3 Allen, 103. See also *Ward v. Whitney*, 3 Sandf. 399, 4 Seld. 442; *O'Brien v. Gilchrist*, 34 Maine, 554; *Benjamin v. Sinclair*, 1 Bailey, 174; *Backus v. The Sch. Marengo*, 6 McLean, C. C. 487; *Wayland v. Mosely*, 5 Ala. 430; *Sutton v. Kettell*, 1 Sprague, 309; *The Henry*, 1 Blatchf. & H. Adm. 465, 485; *Butler v. The Arrow*, 1 Newb. Adm. 59; *Manchester v. Milne*, Abbott, Adm. 115; *Goodrich v. Norris*, id. 196; *Hall v. Mayo*, 7 Allen, 454; *Ryder v. Hall*, ib. 456; *Bradstreet v. Heran*, 2 Blatchf. C. C. 116; *Dows v. Greene*, 32 Barb. 490; *Meyer v. Peck*, 33 Barb. 532, 28 N. Y. 590; *Warden v. Greer*, 6 Watts, 424; *Portland Bank v. Stubbs*, 6 Mass. 425; *Manning v. Hoover*, Abbott, Adm.

is a contract, parol evidence is not admissible to vary its terms,<sup>1</sup> although it is to explain any ambiguity in them.<sup>2</sup>

188; *Bates v. Todd*, 1 Moody & R. 106; *Berkley v. Watling*, 7 A. & E. 29; *Byrne v. Weeks*, 7 Bosw. 372. See *Strong v. Grand Trunk Railway Co.* 15 Mich. 206.

<sup>1</sup> Parol is not admissible to prove representations made by the consignor of goods as to the depth of water at the place of landing named in the bill of lading. *Shaw v. Gardner*, 12 Gray, 488. Nor is it admissible to show a different destination and consignee. *Wolfe v. Myers*, 3 Sandf. 7. Nor to prove an agreement that the vessel might deviate. *May v. Babcock*, 4 Ohio, 334. Nor to show a custom that shippers of gold dust from San Francisco to New York assumed the risk attending land carriage across the Isthmus of Panama. *Simmons v. Law*, 8 Bosw. 213. Nor where there are two routes to a place, an inside one by canal and an outside one by the ocean, to show an agreement to go by the inside route, the bill of lading merely specifying the voyage as from A to B without stating the route. *White v. Van Kirk*, 25 Barb. 16. Nor to show a custom to ascend the river as far as the water would permit, and there land and store the goods. *Cox v. Peterson*, 30 Ala. 608. Nor to show a usage that the owners of packet vessels, between New York and Boston, should be liable only for damage to goods occasioned by their own neglect. *The Sch. Reeside*, 2 Sumner, 567. In *The Mary Hawes*, U. S. D. C. Mass. *Lowell, J.*, where by the bill of lading fish were to be carried from Gloucester to New York, evidence of an agreement between the parties that the vessel might stop at Harwich was held to be admissible. *Lowell, J.*, said: "It has been held in some cases that oral evidence of usage, or of an express license to deviate, may be received on the ground that the bill of lading does not in terms require a direct voyage, but merely a carrying between the two points named, and that the evidence therefore is not contradictory of the written contract, but rather explanatory of the mode in which it should be carried out upon a point concerning which the contract itself is silent. *Lowry v. Russell*, 8 Pick. 360. Without entering upon the general question, it is enough for this case to say that, upon the question of diligence, the shipper would be permitted to show notice to the master of the necessity of prompt delivery, and the master on his part ought to be allowed to prove any agreement or understanding tending to show that the shipper did not consider an early delivery important. On this ground, if upon no other, the evidence is proper to be considered."

Although the price named in the bill of lading is generally conclusive, yet if the shipper knew that the master had no right to insert the specified sum, the ship-owner may demand a higher freight. *Barnard v. Wheeler*, 24 Maine, 412. In *Knox v. The Ninetta*, Crabbe, 534, parol evidence of an agreement to proceed without deviating was held admissible, but as this was the legal effect of the bill of lading, the importance of so deciding is not apparent. In *Sayward v. Stevens*, 3 Gray, 97, the bill of lading contained the clause, "Seven boxes of shingles on deck." Held that evidence of a parol agreement that other goods might be carried on deck was not admissible. The court, however, intimated that if nothing had been said in the bill of lading as to the place of stowage of any of the cargo, the evidence would have been admissible.

<sup>2</sup> *Bradley v. Dunipace*, 1 H. & C. 521; *Butler v. The Arrow*, 1 Newb. Adm.

The party who ships the goods is called the consignor; and he to whom the goods are to be delivered by the terms of the bill is the consignee. The shipper himself is sometimes consignee as well as consignor; that is, the goods are deliverable to him or to his assigns. And if no person is named as consignee, (which is, however, unusual), then the law merchant, or usage, inserts the name of the consignor, and gives to the bill the same effect as if he were the consignee.<sup>1</sup>

The bill of lading is often called a negotiable instrument;<sup>2</sup>

59. In *Russian Steam Nav. Co. v. Silva*, 13 C. B. N. S. 616, a person undertook to hold certain bales of wool until the freight due upon them was paid. By the bill of lading, freight was to be paid "*at the rate of 80s. sterling per ton of 20 cwt. gross weight tallow, other goods, grain, or seed, in proportion, as per London Baltic printed rates.*" Held that parol was admissible to show that, by the usage of trade, this meant that tallow was to be taken as the standard, and that 80s. was not the rate of freight for wool.

In *Chouteau v. Leech*, 18 Penn. State, 224, evidence was admitted to show that a printed clause in a receipt, limiting the liability of the carrier, was by mistake not struck out.

<sup>1</sup> In *Chandler v. Sprague*, 5 Met. 306, A. of Brazil was indebted to P. H. & Co. of New York. At their request, and to pay his debt to them, he shipped goods to this country, on his own account and risk, under bills of lading, making the goods deliverable to his own order, and indorsed by him in blank. The bills of lading were sent to H. & Co. of New York, successors to P. H. & Co., with authority to make the goods thereby deliverable to themselves, or such persons as they might name, with authority to sell the goods, and to apply the proceeds to the payment of their own debt. On the arrival of the goods, H. & Co. filled up the bills of lading, making the goods deliverable to the plaintiffs, who were to sell them and account for the proceeds to P. H. & Co. The plaintiffs received the goods, and afterwards they were attached by the defendant, a deputy sheriff, as the property of P. H. & Co. The court decided in favor of the plaintiffs. They said: "In the first place, we are of opinion that no property in these goods vested in P. H. & Co. Had they filled up the blank in the bill of lading, as they had authority to do, so as to make the goods deliverable to themselves, and accepted the consignment, the property would have vested in them as consignees liable to account to the consignor." The court also said, that, although A., the consignor, was not in strictness the consignee, yet he had a right to direct the delivery of the property in any way he might think fit, and by sending the invoice and bills of lading to H. & Co., and authorizing them to name the consignee, and by their naming the plaintiffs the property thereby vested in them. See also *Turner v. Trustees of The Liverpool Docks*, 6 Exch. 543, 6 Eng. L. & Eq. 507; *Ellershaw v. Magniac*, 6 Exch. 570, n.; *Wait v. Baker*, 2 Exch. 1; *Van Casteel v. Booker*, 2 Exch. 691; *Key v. Cotesworth*, 7 Exch. 595, 14 Eng. L. & Eq. 435; *Brown v. North*, 8 Exch. 1, 16 Eng. L. & Eq. 486.

<sup>2</sup> *Evans v. Marlett*, 1 Ld. Raym. 271; *Lickbarrow v. Mason*, 2 T. R. 63, 1 H.

but it is not so, quite to the extent of a note payable to order, and it is called in later cases, more accurately, *quasi negotiable*. It will be noticed that the word "assigns" is used, and not the word "order;" but although at common law the mere use of the word "assigns" would not make a *chose in action* transferable, the law merchant makes a bill of lading so far transferable by indorsement that an indorsee may sustain an action against the owner or master, founded on his ownership of the goods, such indorsement, with delivery, being *prima facie* evidence of the transfer of the goods to him. But he cannot, generally, sue *on the bill of lading* in his own name.<sup>1</sup> In admiralty, however, the assignee may sue in his own name.<sup>2</sup> It is said that even if the word "assigns" be omitted, an order written and signed by the consignee on the back of the bill, with delivery of it, binds the ship to the delivery of the goods to the indorsee.<sup>3</sup>

In a recent English case an indorsement of a bill of lading "without recourse" was held to be valid; and the ship-owners, having delivered the goods in pursuance of it, were not permitted to sue the original consignees.<sup>4</sup> Undoubtedly, an indorsement and delivery of the bill of lading is binding only when it is made for

Bl. 357, 6 East, 21, n.; *Wright v. Campbell*, 4 Burr. 2046; *Hibbert v. Carter*, 1 T. R. 745; *Jenkyns v. Usborne*, 7 Man. & G. 678, 698; *Fretz v. Bull*, 12 How. 466, 468; *The Water Witch*, 1 Black, 494.

<sup>1</sup> If the action is brought on the bill of lading it must be in the name of the original promisee. *Thompson v. Dominy*, 14 M. & W. 402. In *Howard v. Shepherd*, 9 C. B. 297, 319, *Maule, J.*, said: "Now it is perfectly clear, that a contract cannot be transferred, so as to enable the transferee to sue upon it." See also *Sanders v. Vanzeller*, 4 Q. B. 260, 295; *Tindal v. Taylor*, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210, 216; *Dows v. Cobb*, 12 Barb. 310; *Lineker v. Ayeshford*, 1 Cal. 75. But even if the assignee cannot maintain an action on the contract, yet if the right of property and of possession be in him, he can sue the master for detaining or converting the goods, and the latter would be estopped from denying that he had them after the declaration in the bill of lading, on the faith of which the indorsee had bought and paid for them. *Tindal v. Taylor*, *supra*.

<sup>2</sup> In *Cobb v. Howard*, 3 Blatchf. C. C. 524, Mr. Justice *Nelson* says: "It is every day's practice in the Admiralty to allow suits to be brought in the name of the assignee of a *chose in action*." See also *Mutual Safety Ins. Co. v. Cargo of the Brig George*, *Olcott*, Adm. 89; *The Sch. Mary Ann Guest*, id. 498.

<sup>3</sup> So held at Nisi Prius, by Lord *Tenterden*, C. J., *Renteria v. Ruding*, *Moody & M.* 511.

<sup>4</sup> *Lewis v. McKee*, Law Rep. 2 Ex. 37.



good consideration, and by a party having the right to indorse; and we add, for a *new* consideration. For we hold the law to be, that an indorsement of the bill, in payment or security of the previously existing debt of the consignee, is no bar against the consignor's right to stop the goods *in transitu*, unless the indorsee has in some way lost some valuable right or remedy by accepting this payment or security, which would, indeed, amount to a new consideration. And we should be disposed to extend this rule further, and say that an indorsee only for such payment or security of a previous debt, would, like an indorsee for no consideration, be unable to recover the goods as against one who, for good consideration, and in good faith, subsequently acquired a title to the goods and possession of them, either as transferee, or as attaching creditor.<sup>1</sup>

An agreement, on good consideration, by a consignee to assign upon receipt of the bill, is an assignment, or, at least, an equitable assignment of the bill of lading, valid against all subsequent assignees with notice.<sup>2</sup> If goods are shipped by the owner under an agreement by which the consignee has advanced money thereon, and agreed to make a further advance on receiving the bill of lading, the consignee has a lien on the goods to secure both advances, as against one who afterwards, though before this bill of lading is delivered, receives a second bill of lading of the goods with notice that the first has been issued.<sup>3</sup>

The property in goods for which a bill of lading is given, may,

<sup>1</sup> In *Newsom v. Thornton*, 6 East, 17, the plaintiffs consigned certain barrels of pork to one Church, their factor in London, on the joint account of themselves and Church. By the bills of lading, the pork was deliverable to Church or his assigns. Previous to the arrival of the pork, Church obtained a loan of £200 from the defendants, and agreed with them, in consideration of a further advance, to leave with them an order on his clerk, as he himself was about leaving for Ireland, to indorse and deliver to them the bill of lading for the pork when it arrived. After his departure, the defendants contrived to obtain from the clerk the bill of lading indorsed to them, without payment of the sum agreed on, and claimed to hold it as indorsees for a valuable consideration, namely, their previous advance to Church. But the court held, that, not having advanced the sum agreed upon, there was no consideration, and that they could not hold it for their previous debt. See also *Snaith v. Burridge*, 4 Taunt. 684; *Warner v. Martin*, 11 How. 209, 225.

<sup>2</sup> *Walter v. Ross*, 2 Wash. C. C. 283, 289, per Mr. Justice Washington.

<sup>3</sup> *Stevens v. Boston & Worcester R.* 8 Gray, 262.

of course, be legally transferred for good consideration to any purchaser without indorsement and delivery of the bill; but it is not only the most usual, but by far the most proper way of doing this, to indorse the bill; unless the goods have already been delivered to the consignee, so as to discharge the bill.<sup>1</sup>

If the bill of lading itself contains a condition, or if the indorsement be made upon a condition, the possessor of the bill cannot, by means of it, claim possession of the goods, unless the condition is satisfied.<sup>2</sup>

Bills of lading are usually signed in sets of three. One is held by the master; one retained by the consignor, and one sent, either with the goods or by a separate conveyance, to the consignee. If the consignor chooses to do so, he may send his copy of the bill to the consignee by another conveyance. If the bill contains the name of the consignee, and the bill is sent to him, this completes the title of the consignee; the goods are his, and are carried at his expense and risk; subject only to the right of the consignor to stop the goods for any breach of the conditions of sale before their actual arrival into the possession of the consignee.<sup>3</sup> If the

<sup>1</sup> If a party claims a right to the goods *by reason of a bill of lading*, it is necessary that it should be both indorsed and delivered to him. *Buffington v. Curtis*, 15 Mass. 528; *Allen v. Williams*, 12 Pick. 297. But where a merchant in Boston ordered merchandise to be shipped to him from Liverpool on board a general freighting vessel, designated by him for that purpose, and the goods were shipped in pursuance of those orders, and a bill of lading given by which they were made deliverable to the merchant in Boston, it was held by the court that the shipper could not, by withholding the bill of lading and subsequently inclosing it and the invoice in a letter to his agent, with directions to deliver it to the merchant in Boston only upon payment for the merchandise, convert the absolute delivery into a conditional one, or divest the merchant of his property in the goods. The court said: "This conclusion is founded, not upon the supposed specific effect of executing or delivering a bill of lading, or the peculiar character supposed to be attached to a bill of lading as a *quasi* negotiable instrument, but upon the general principle of the common law, applicable to the sale of personal property." *Stanton v. Eager*, 16 Pick. 467. In *Allen v. Williams*, 12 Pick. 297, 302, the court said: "Even a sale or pledge of the property without a formal bill of lading by the shipper, would operate as a good assignment of the property, and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiffs."

<sup>2</sup> *Barrow v. Coles*, 3 Camp. 92; *Mitchel v. Ede*, 11 A. & E. 888; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Walley v. Montgomery*, 3 East, 585.

<sup>3</sup> *Walley v. Montgomery*, 3 East, 585. In this case the consignor sent to the

consignor be himself consignee, and sends the bill to a third party, who has ordered the goods, or is to receive them, either indorsed to him or indorsed in blank, it is the same thing as if such person were named as consignee in the bill.<sup>1</sup> If the consignor, being also consignee, sends such a bill without indorsement, the party receiving it acquires no rights under it, but only has notice by it that such goods are shipped in such a vessel to such a port.<sup>2</sup> And it is quite common for the consignor to send such a bill to the party ordering the goods, and then to send to the agent of the consignor

consignee an invoice of the goods laden on board the vessel, and also a bill of lading in the usual form. By the terms of the invoice, the goods were "for account and at the risk of the consignee." By the bill of lading, the goods were deliverable on payment of freight as per charter-party. The letter of advice, also, informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo. In an action of trover brought by the consignee against the agent of the consignor, who had obtained possession of the goods under another bill of lading, Lord *Ellenborough* said that but for the invoice he should be of opinion that the plaintiff was not entitled to recover, because the bill of lading and the letter of advice tended to show that two things were to be done by the plaintiff, before the property in the goods was to vest in him; first, the acceptance of the bills, and second, the payment of freight, and the plaintiff having offered to perform only the first, would not be entitled to recover but for the invoice, which showed that the goods were shipped for account and at the risk of the consignee. And, generally, if the consignee's name is inserted in the bill of lading, and the bill is sent to him, the property in the goods vests in him against any person except a previous assignee of the bill of lading. *Allen v. Williams*, 12 Pick. 297; *Stanton v. Eager*, 16 Pick. 467.

<sup>1</sup> *Haille v. Smith*, 1 B. & P. 563; *Chandler v. Sprague*, 5 Met. 306, which see at length, *ante*, p. 192, note 1; *Van Casteel v. Booker*, 2 Exch. 691; *Ellershaw v. Magniac*, 6 Exch. 570, n. In this case the plaintiff had entered into a contract with A & B for the purchase of some linseed. A & B drew upon him for the price, and the bills of exchange were accepted and duly paid by the plaintiff. To procure the linseed, he entered into a contract of charter-party for the hire of a certain ship to proceed to Odessa and obtain it. The linseed was delivered on board. The bills of lading stated that it was shipped by A & B, deliverable to order or assigns. A & B afterwards indorsed the bills of lading to one Poel, who transferred them to the defendants. On this state of facts, the court held that no property in the linseed had passed to the plaintiff; that the form of the bill of lading showed that the shippers intended to preserve the right of property and possession in themselves, until they had made an assignment of the bill of lading to some other person; and that, the defendants being indorsees for a valuable consideration, the right of property was in them. See also *Wait v. Baker*, 2 Exch. 1.

<sup>2</sup> *Nix v. Olive*, cited in *Abbott on Shipping*, 538; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Coxe v. Harden*, 4 East, 211.

in the same port or country a bill indorsed to that agent, or to the party ordering the goods, or in blank, with orders to deliver the bill, or to receive the goods and deliver them, if payment be made or secured, or such conditions as the consignor chooses to prescribe be complied with. This prevents all question as to the right of the consignor to retain them for the price; although it might raise a question whether the goods in this case ever were sold by the consignor, and consequently, whether his holding them until the price is paid or secured could be considered as a stoppage *in transitu*.

If this precaution be not taken, but the party ordering the goods is made consignee in the bill which is sent to him, the consignor runs the risk of his getting them into his possession, or transferring them by an indorsement for good consideration before the consignor can stop them *in transitu*. For shipping goods to one who has ordered them, is, in general, a completed sale, vesting the property in him, and is a *constructive* delivery, subject only to be defeated by stoppage for the price before actual delivery.<sup>1</sup> The obligation of the master to deliver the goods according to the bill of lading is so strong, that, where an unindorsed bill was sent to one ordering the goods, and he obtained possession by assuring the master that the goods were sent to him, and were his own and deliverable to him, and the shipper sued the ship-owner on the bill, who defended himself on the ground that the party to whom the goods were delivered was in fact the owner of them, and had a right to them, it was admitted, both by the court and counsel, that if the defendant established the title and right of that party, the plaintiff must still recover against him, although with only nominal damages.<sup>2</sup>

The bills of lading are evidence against the master or the owner of the ship, not only as to the reception of the merchandise, but as to any material fact stated in them respecting the quantity, or quality, or any other element in the description of the goods.<sup>3</sup> It

<sup>1</sup> Dawes v. Peck, 8 T. R. 330; Dutton v. Solomonson, 3 B. & P. 582; Brown v. Hodgson, 2 Camp. 36; Evans v. Marlett, 1 Ld. Raym. 271; Snee v. Prescott, 1 Atk. 245; Swain v. Shepherd, 1 Moody & R. 223; Fragano v. Long, 4 B. & C. 219; Stanton v. Eager, 16 Pick. 467.

<sup>2</sup> Brandt v. Bowlby, 2 B. & Ad. 932.

<sup>3</sup> In Hall v. The Ship Chieftain, 9 La. 318, a quantity of iron was shipped on board a vessel. The bill of lading contained the usual clause stating it to have

is therefore usual to describe them only as so many boxes, or bales, or parcels, "numbered and marked as per margin"; sometimes the words "contents unknown," or "said to contain," etc., are added; and if the words "containing," etc., are added, which is also not unusual, the master and ship are held only to deliver the boxes as they were received by them.<sup>1</sup> So it has been held that the ship-owner is bound only to deliver the quantity received, if the words "weight unknown" are added, although a specific weight is mentioned in the bill.<sup>2</sup> So, if the weight is stated in writing, and the expression "weight unknown" is in print.<sup>3</sup> The evidence of the bill of lading, however, is not conclusive as between the ship-owner and shipper, but may be rebutted by showing mistake or fraud.<sup>4</sup>

It is not usual for the right of lien on the goods for the freight to be expressly reserved by the ship-owner; but whether it is so or not, the law merchant gives this lien.<sup>5</sup> The master is bound to deliver, and the shipper is bound to pay; nor can the master demand his freight, without being ready to deliver the goods on payment of it,<sup>6</sup>

been received in good order and condition. On delivery, the iron was found to be much rusted. It was held that a paper written and signed by the shippers, and sent to the captain of the vessel, stating that the iron was rusty when shipped, would control the statement in the bill of lading, and exonerate the carriers from their liabilities. See also cases cited *ante*, p. 187, n. 3, and p. 190, n. 4.

<sup>1</sup> In *Clark v. Barnwell*, 12 How. 272, the bill of lading contained the usual clause that the boxes containing the goods were shipped in good order, "contents unknown." The court said: "It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases, excluding any implication as to the quantity and quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes." See also *Vernard v. Hudson*, 3 Sumner, 405; *Valin*, Com. sur l'Ord. de la Mar. Liv. 3, tit. 2, art. 2. But even if the bill of lading does not contain these words, evidence is admissible to show that the goods were damaged at the time they were received by the carrier, though such damage was not apparent. *Bissel v. Price*, 16 Ill. 408; *The Columbo*, 3 Blatchf. C. C. 524. See *Bradley v. Dunipace*, 1 H. & C. 521; *Ellis v. Willard*, 5 Seld. 529.

<sup>2</sup> *Shepherd v. Naylor*, 5 Gray, 591. In *Kelley v. Bowker*, 11 Gray, 428, where the bill of lading stated that 2280 bushels more or less had been shipped, all to be delivered, it was held that the master was bound only to deliver the number actually shipped, viz. 2217 bushels.

<sup>3</sup> *Jessel v. Bath*, Law Rep. 2 Ex. 267.

<sup>4</sup> See cases cited *ante*, p. 190, note 4.

<sup>5</sup> See cases *ante*, p. 174, n. 2.

<sup>6</sup> *Brittan v. Barnaby*, 21 How. 527.

nor can the shipper demand his goods without a tender of the freight.<sup>1</sup> But although the law gives this lien, even if it be not expressly reserved, yet it does not give it where it is expressly waived, or where it is waived by implication and necessary construction. As the right of lien, at common law, means precisely the right of retaining or continuing possession until the price is paid, if the bargain be that freight shall be paid in so many days after arrival and delivery of the goods, this is held to mean that the goods are to be delivered first, and at a future day the freight is to be paid; and this, of course, is destructive of the idea of a continued possession by the master or owner of the ship, and consequently of his lien. So the courts of law have generally held.<sup>2</sup> But if the expression is "within ten days" after the ves-

<sup>1</sup> The usual clause in the bill of lading, that the goods are to be delivered on payment of freight, shows that these two acts are concurrent, and that neither party can sue on the contract without an offer to perform his part of it. Thus in *Lane v. Penniman*, 4 Mass. 91, *Parsons*, C. J., says: "Although the master may retain the cargo until the freight be paid or tendered, yet he must be ready to deliver the cargo on payment or tender. See also *Palmer v. Lorillard*, 16 Johns. 348; *Frothingham v. Jenkins*, 1 Cal. 42; *Isham v. Greenham*, 1 Handy, 357; *Certain Logs of Mahogany*, 2 Sumner, 589; *Möller v. Young*, 5 Ellis & B. 755, 34 Eng. L. & Eq. 92, reversing the same case in the Queen's Bench, 5 Ellis & B. 7, 30 Eng. L. & Eq. 345.

<sup>2</sup> The law seems now to be well settled, that, where the time and place of the payment of the freight are inconsistent with the right of lien, it will be considered as waived. What will be regarded as such an inconsistency, is said by Chancellor *Kent* to be, "When the payment of the freight is, by agreement, postponed beyond the time, or is at variance with the time and place for the delivery of the goods." 3 *Kent*, 221. In the *Sch. Volunteer*, 1 Sumner, 551, 569, *Story*, J., said: "If the delivery of the goods is, by the charter-party, to precede the payment, or security of payment of freight," there will be no lien. In *Chandler v. Belden*, 18 Johns. 157, 162, it was held not to exist when the cargo was to be delivered before the arrival of the periods of payment. It was so held in *Alsager v. St. Katherine's Dock Co.* 14 M. & W. 794, where freight was to be paid two months after delivery. See also *Foster v. Colby*, 3 H. & N. 705. This subject received an elaborate investigation by the Supreme Court of the United States in the case of *Raymond v. Tyson*, 17 How. 53. The suit was brought by a libel in admiralty in the District Court of the United States for the Northern District of California. The case was then taken to the Circuit, and thence to the Supreme Court. The vessel was chartered for a voyage from London to Cardiff, to load for a port on the Pacific, where she was to be employed between such ports as the charterers might elect; thence to be returned back, either to New York or Great Britain, at their option. The vessel was to be em-

sel's return, this is not inconsistent with the existence of the lien, because there is no implication that the delivery is to precede the payment of freight.<sup>1</sup> So, it is held, if the expression is, in a certain number of days, "after discharge of homeward cargo,"<sup>2</sup> or, after the vessel's "return to and discharge in Boston."<sup>3</sup> An agreement in the bill of lading that freight shall be payable in Liverpool one month after the vessel shall sail from there on a voyage for Sidney, "vessel lost or not lost," was held to take away from the master the right to retain the goods on arrival at Sidney, for the unpaid freight.<sup>4</sup> We think that the influence of the common law on the *privilege* of the ship-owner against the cargo, for his freight, has essentially modified, and not improved, the principles of the law mer-

ployed for fifteen months, with a privilege to the charterer to extend it to twenty-four months. Two thousand dollars per month was to be paid for the use of the vessel. This payment was to be made semi-annually in New York. The court held, that, under these circumstances, the ship-owners had no lien on the cargo for the freight, or for the sum agreed to be paid for the use of the ship. The court said: "The next rule for the construction of charter-parties, deduced by us from an examination of all the leading cases in the English and American reports, including those cited in the argument of the counsel of the appellee, is this: that though the owner of a ship, of which the charterer is not the lessee, but freighter only, has a lien upon the cargo for freight, properly so called, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as having been waived, without words to that effect, if there are stipulations in the charter-party inconsistent with the exercise of the lien, or when it can fairly be inferred that the owner meant to trust to the personal responsibility of the charterer."

<sup>1</sup> The Sch. Volunteer, 1 Sumner, 551, 570. See also, generally, *Ruggles v. Bucknor*, 1 Paine, C. C. 358; *Chase v. Westmore*, 5 M. & S. 180; *Crawshaw v. Homfray*, 4 B. & Ald. 50; *Pinney v. Wells*, 10 Conn. 104, 115; *Pickman v. Woods*, 6 Pick. 248; *Belcher v. Capper*, 4 Man. & G. 502; *Lucas v. Nockells*, 4 Bing. 729; *Horncastle v. Farran*, 3 B. & Ald. 497. In *Hammond v. M'Crie*, Q. B. 1855, 32 Eng. L. & Eq. 210, it was held that an agreement concerning a cargo of lead, that it should be weighed as landed, to ascertain when five tons had been discharged, and freight was to be then paid for each five tons as weighed, would give the master no right, after a portion of the lead was on the wharf, to cart it away to his own warehouse, on the ground that he had a lien on it for the freight.

<sup>2</sup> The Kimball, 3 Wallace, 37. See *Tamvaco v. Simpson*, Law Rep. 1 C. P. 363; *Paynter v. James*, Law Rep. 2 C. P. 348.

<sup>3</sup> Certain Logs of Mahogany, 2 Sumner, 589.

<sup>4</sup> *Kirchner v. Venus*, 12 Moore, P. C. 361, affirming *How v. Kirchner*, 11 ib. 21, and dissenting from *Gilkison v. Middleton*, 2 C. B. N. s. 134, and *Neish v. Graham*, 8 Ellis & B. 505.

chant in this respect. These principles would not hold such a bargain as necessarily inconsistent with this lien, or rather this security; for the substantial meaning of the lien is, that the ship-owner looks to the goods as security for the freight earned by carrying them; and if the goods are held to secure the payment of the freight at a certain time, and are delivered to the consignee with that understanding, we do not see why it should be inconsistent with the law of lien, that the ship-owner has still a security on the goods for his freight, until a *bonâ fide* sale is made of them. We think the question should always be, whether the ship-owner, intended to give up that security for his freight, which he had by his contract upon the goods; if he did, the court will not revive his lien; if he did not, the court should in some way, if in its power, give him that security without violating the terms of the agreement; that is, without requiring immediate payment of freight, if a delay of payment has been agreed upon.

What is the meaning of the contract in this respect should always be determined by the words and circumstances of each case.<sup>1</sup> An admiralty court would have full equity powers, and its own process *in rem*, in a case involving questions of this

<sup>1</sup> In *Ruggles v. Bucknor*, 1 Paine, C. C. 358, Mr. Justice *Thompson* says: "Each case must depend in a great measure upon its own circumstances. Parties are not bound to any fixed and precise stipulations to be embraced in a charter-party. They can insert any covenants they please, to answer the end and effect the object they have in view." See also *Gracie v. Palmer*, 8 Wheat. 605, 634; *Raymond v. Tyson*, 17 How. 53. And in a doubtful case the law will lean towards that construction which favors the right of lien. Thus Judge *Ware*, in *Drinkwater v. The Brig Spartan*, Ware, 149, 158, speaks of it as a lien strongly favored by the law. Mr. Justice *Story* also, in *Certain Logs of Mahogany*, 2 Sumner, 589, says it ought not to be displaced without a clear and determinate abandonment of it. See also *Clarkson v. Edes*, 4 Cow. 470. In *Howard v. Macondray*, 7 Gray, 516, the vessel was chartered for fifteen months with privilege to the charterers to continue the time to thirty months, at the rate of two thousand dollars a month, to be paid to the owners, in New York, semiannually, the balance of the charter to be paid on the discharge of the cargo at the final port of delivery. The first payment was duly made, but before the second was due the charterers failed, and it was agreed to cancel the charter-party on payment of a draft drawn upon the agent of the charterers in San Francisco. The draft was protested, but the court were of the opinion on all the facts in the case that it was the intention of the parties to cancel the charter-party at all events, and that the owner had a lien on the goods transported at San Francisco, which was considered under the new agreement as the final port of delivery.



kind; and would doubtless pay much regard to the principles of maritime law. It has been held that the parties may agree that the lien shall continue, notwithstanding delivery. And the lien is not lost if the master is induced to surrender the possession of the goods by fraud or trick, and replevin may be maintained.<sup>1</sup> And if the goods are in the possession of the master, and are replevied, the lien is not waived by suing the owners of the goods and attaching other property.<sup>2</sup>

It is not an unfrequent stipulation in a charter-party that the cargo is to be taken alongside and to be taken from the ship's tackle, free of risk and expense to the ship. It has been argued that this clause is inconsistent with the right of lien after discharge of the cargo. But while it may be clear that a delivery of the cargo on the wharf to the consignee in accordance with such an agreement, would amount to a waiver of the lien,<sup>3</sup> yet it is also clear that the ship-owner may discharge the cargo, and refuse to deliver it until his freight is paid, notwithstanding this clause.<sup>4</sup>

It may be added, that a third person, wrongfully in possession of goods, cannot detain them from the consignee or actual owner, on the ground that he has not paid the freight due upon them.<sup>5</sup>

The bill of lading may contain, besides the usual contract for the transportation of the goods, stipulations in regard to the disposal of them or their proceeds.<sup>6</sup>

<sup>1</sup> *Bigelow v. Heaton*, 6 Hill, 43, 4 Denio, 496. It was, however, expressly held, in this case, that the intention of the master in parting with the goods was not to be considered, unless there was an express agreement that the lien should continue.

<sup>2</sup> *Barnard v. Wheeler*, 24 Maine, 412.

<sup>3</sup> *Black v. Rose*, 2 Moore, P. C., n. s. 277.

<sup>4</sup> *The Kimball*, 3 Wallace, 37. In *Vose v. Allen*, 3 Blatchf. C. C. 289, the bill of lading contained the clause: "iron to be discharged by consignees in five days after arrival of vessel at New York, or pay demurrage of \$25 per day after that time." The consignee refused to receive the iron at the wharf the master selected, wishing the goods to be unloaded at another wharf. The goods were lost by the breaking down of the wharf. Held that the owner of the vessel was liable, and that the above clause was of no special importance under the circumstances of the case, it being the duty of the master to select a suitable wharf.

For a recent English case on the construction of a bill of lading with a proviso, holding that the contract was divisible, see *Wilson v. London Steam Nav. Co.* Law Rep. 1 C. P. 61.

<sup>5</sup> *Walley v. Montgomery*, 3 East, 585.

<sup>6</sup> In *Wallis v. Cook*, 10 Mass. 510, it was agreed in the bill of lading that the

In respect to stipulations, it has been said that they must be made in words sufficiently intelligible to indicate an agreement that the operation of the law merchant, in respect to those instruments, is not to prevail, and they must be in writing, signed by the parties, before they can be received as an auxiliary to explain how the contract is to be performed.<sup>1</sup>

net proceeds of the goods shipped, after deducting commissions and freight, should be paid to the shipper ninety days after the arrival of the vessel at her port of discharge in the United States. On the return voyage the ship, bound to New York, was stranded in Long Island Sound, and the cargo damaged and abandoned to the underwriters, but the ship was afterwards got off and repaired. The adventure of the plaintiffs was insured for the round voyage. No effects were shipped on board the vessel on her return voyage on account of the plaintiffs, but the defendant had invested the proceeds of the outward adventure in the cargo on his own account. The court held that the contract was in effect a loan on the personal responsibility of the defendant and his principals, to be repaid if the ship arrived at her port of discharge, and that, as she might, after being repaired, have gone there, the defendant was liable. See also *Winchester v. Patterson*, 17 Mass. 62.

In *Steamboat John Owen v. Johnson*, 2 Ohio State, 142, where there was a stipulation in the bill of lading to deliver the goods to the consignee on payment of a certain sum to the clerk of the boat for the consignor, and the goods were delivered without payment, it was held that the boat was liable.

In *Jones v. Hoyt*, 23 Conn. 157, the bill of lading contained a stipulation that the lumber on board should be measured on the deck of the vessel on arrival at the port of destination, by the consignee and master, and freight should be paid according to such measurement. On arrival, the consignee having died, no person appeared to assist the captain in measuring the lumber, and it was accordingly put on the wharf and measured. Held that the measuring on deck was not a condition precedent, and that the owner of the vessel, having substantially complied with the stipulations in the bill of lading, was entitled to freight.

<sup>1</sup> *Brittan v. Barnaby*, 21 How. 527. In this case a stamp in red ink was put on the back of the bill of lading by the ship-owner, which provided that freight was to be paid before delivery, if required. The time when it was put on was not certain, but it was assumed to be the time of making the bill. There was no evidence of any assent to its provisions on the part of the shipper, or of how it was regarded by the ship-owner, until it was set up in the answer; and the court held that it was not admissible to control the provisions of the bill of lading. See also *Lewis v. Great Western R. & N.* 867; *Western Transp. Co. v. Newhall*, 24 Ill. 466; *The Brig May Queen*, 1 Newb. Adm. 464.

## SECTION IV.

## OF THE LIABILITY FOR FREIGHT.

It is often said that the contract for freight is an entire contract.<sup>1</sup> It is so in many respects; but the rule is not without some exceptions and modifications. This rule of entirety operates, first, on the quantity of the goods, no freight being payable unless all are delivered;<sup>2</sup> next, upon the completion of the voyage, the general rule being that no freight is payable unless the whole voyage is performed.<sup>3</sup>

<sup>1</sup> The *Nathaniel Hooper*, 3 Sumner, 542; *Post v. Robertson*, 1 Johns. 24, per *Thompson, J.*; *Halwerson v. Cole*, 1 Speers, 321; *Adams v. Haught*, 14 Texas, 243.

<sup>2</sup> See *post*, p. 205, n. 3.

<sup>3</sup> In *The Nathaniel Hooper*, 3 Sumner, 542, 554, Mr. Justice *Story* said: "The general principle of the maritime law certainly is that the contract for the conveyance of merchandise on a voyage is, in its nature, an entire contract, and unless it be completely performed by the delivery of the goods at the place of destination, no freight whatsoever is due; for a partial conveyance is not within the terms or the intent of the contract, and unless it be completely performed by the delivery of the goods at the place of destination, no freight whatsoever is due, and the merchant may well say *non in hæc fœdera veni*." Lord *Ellenborough* also, in *Hunter v. Prinsep*, 10 East, 378, 394, states the rule with great accuracy. He says: "The ship-owners undertake that they will carry the goods to the place of destination unless prevented by the dangers of the seas, or other unavoidable casualties; and the freighter undertakes that if the goods be delivered at the place of their destination, he will pay the stipulated freight; but it was only in that event, namely, of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the ship-owner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented, or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all."

In *Mackrell v. Simond*, 2 Chitty, 666, 673, Lord *Mansfield* says: "The safety of the ship is the mother of freight." And Mr. Justice *Maule*, in *Crozier v. Smith*, 1 Man. & G. 407, 415, says: "Freight is generally payable only on the arrival of the vessel, when the merchant receives the goods on which it is charged." See also *Osgood v. Groning*, 2 Camp. 466; *Barker v. Cheriôt*, 2

If freight is payable by the ton, or bale, or package, or barrel, severally, or where different parts of the cargo are shipped upon distinct and separate terms as to freight, the consignee must pay for what is delivered.<sup>1</sup> If an entire freight is payable for an entire cargo, and a part is delivered and accepted, the freight of that part must be paid.<sup>2</sup> But the consignee may refuse to receive the part offered to him, and then the consignor is not bound to pay a *pro rata* freight.<sup>3</sup> Where what is shipped increases on the voyage, it has been held that freight is due only for what is *shipped*.<sup>4</sup> A lit-

Johns. 352; *Armroyd v. Union Ins. Co.* 3 Binn. 437; *Union Ins. Co. v. Lennox*, 1 Johns. Cas. 377, 383; *Sampayo v. Salter*, 1 Mason, 43; *Caze v. Baltimore Ins. Co.* 7 Cranch, 358; *Vlierboom v. Chapman*, 13 M. & W. 230; *Tirrell v. Gage*, 4 Allen, 245.

<sup>1</sup> *Christy v. Row*, 1 Taunt. 300; *Ritchie v. Atkinson*, 10 East, 295. See also *McGaw v. Ocean Ins. Co.* 23 Pick. 405, 414; *Frith v. Barker*, 2 Johns. 327; *Wooster v. Tarr*, 8 Allen, 270.

<sup>2</sup> *Hinsdell v. Weed*, 5 Denio, 172.

<sup>3</sup> *Sayward v. Stevens*, 3 Gray, 97. In this case the owners of the vessel agreed to transport for a gross sum, a number of miscellaneous goods, which bore no proportion to each other in size or in cost of transportation. Part were lost on the voyage, and the consignee refused to accept the residue. The court held that the contract being entire, the consignor was not liable to pay either an entire or a *pro rata* freight. The goods which arrived were sold by the captain, as no one appeared to claim them. The owner of the goods then brought an action for money had and received, to recover the proceeds of the sale. The defendants claimed to deduct the freight due for the goods, on the ground that the action for money had and received was an affirmation of the contract. But the court held that freight should not be deducted. But, as when the goods were sold there was supposed to be more than there actually was, and the agent of the owner of the ship repaid to the purchaser the sum of seventy-five dollars, the court held that this should be deducted, and also all necessary charges for care and storage of the goods and the expenses of the sale. *Stevens v. Sayward*, 3 Gray, 108, 8 Gray, 215.

<sup>4</sup> In a recent case in the Court of Exchequer in England, 2,664 quarters of corn were shipped on board a vessel to be carried from Odessa to Gloucester. The bills of lading were in the usual form, with the clause "quantity and quality unknown," freight payable at a certain rate per quarter. On the arrival of the vessel, a portion of the corn having become heated and damaged, the bulk was found to have increased to 2,785½ quarters. The court held that freight was payable for the quantity *shipped*, and not for that *delivered*. *Gibson v. Sturge*, 10 Exch. 622, 29 Eng. L. & Eq. 460. In *Buckle v. Knoop*, Law Rep. 2 Ex. 125, freight by the charter was a certain rate "per ton of fifty cubic feet delivered." Pressed cotton expanded on being taken from the hold. Held that freight was due only on the amount shipped. Affirmed in the Exchequer Chamber, Law

eral and precise application of the provisions of the bill of lading would deprive the ship-owner of all freight, if the goods were not delivered in as good condition as received. But if the ship-owner delivers a part of the goods and pays for the rest, he is entitled to his freight on the whole, provided the consignee receives the part delivered.<sup>1</sup> If the goods are accepted and freight is demanded, the shipper may have his claim against the ship-owner, by way of offset or otherwise, for the value of the goods not delivered.<sup>2</sup> And

Rep. 2 Ex. 333. If freight is payable per "net weight delivered," freight is due only on the amount delivered. *Coulthurst v. Sweet*, Law Rep. 1 C. P. 649.

<sup>1</sup> *Hammond v. McClures*, 1 Bay, 101.

<sup>2</sup> In England, the rule is well settled that the shipper cannot, in an action brought against him for freight, set up, in defence, that the goods were damaged by the negligence of the carrier, but is obliged to resort to a cross action. *Bellamy v. Russell*, 2 Show. 167; *Bornmann v. Tooke*, 1 Camp. 377; *Shields v. Davis*, 6 Taunt. 65, 4 Camp. 119. In *Gibson v. Sturge*, 10 Exch. 622, 29 Eng. L. & Eq. 460, 466, the court said: "It is clear, according to the general law on the subject, that the circumstances of the wheat being damaged does not at all affect the right of the plaintiffs to freight." The reason that the shipper is obliged to resort to a cross action, is owing to the English statutes of set-off (2 Geo. II. c. 22, § 15, and 8 Geo. II. c. 24, § 4), which do not allow a claim of this nature to be offsetted. In this country, however, the statutes of set-off in the various States are generally of a more liberal nature, and the shipper has therefore been allowed to set up in defence, in the nature of a set-off, the damage done to the goods by the carrier. And *Lord Campbell, C. J.*, in *Thompson v. Gillespy*, 5 Ellis & B. 209, 32 Eng. L. & Eq. 153, says it is a reproach to the legislature that parties have not the means of settling cross claims, except by distinct actions. In those States where the question has not yet arisen, it must be decided, when it is presented, by the provisions of the statutes of set-off of the respective States. An examination of these statutes is, however, foreign to the purposes of this work. We shall therefore merely cite the cases where the question has arisen and been decided. *Schureman v. Withers*, Anthon, 166; *Ogden v. Coddington*, 2 E. D. Smith, 317; *Hinsdell v. Weed*, 5 Denio, 172; *Bartram v. M'Kee*, 1 Watts, 39; *Leech v. Baldwin*, 5 Watts, 446; *Humphreys v. Reed*, 6 Whart. 435; *Ewart v. Kerr*, 1 Rice, 203; *Ewart v. Kerr*, 2 M'Mullan, 141; *Edwards v. Todd*, 1 Scam. 462; *Ship Rappahannock v. Woodruff*, 11 La. Ann. 698; *Glover v. Dufour*, 6 La. Ann. 490; *Waring v. Morse*, 7 Ala. 343; *Boggs v. Russell*, 13 B. Mon. 239. The English rule is followed in Georgia. *Brown v. Clayton*, 12 Ga. 576. In *Snow v. Carruth*, 1 Sprague, 324, it was held by *Sprague, J.*, that damage done to the goods could be set up as a defence to an action brought against a consignee for freight, in admiralty. See also *Bradstreet v. Heron*, Abbott, Adm. 209; *Thatcher v. McCulloh*, Olcott, Adm. 365. And in a subsequent case, in an action for freight, it being proved that the damage done

if the carrier pays to the shipper the full value of the goods, he may deduct from it the freight which would have been payable to him, as otherwise the shipper would be more than indemnified.<sup>1</sup>

As the usual bill of lading expresses that the goods are to be delivered to A B, "he paying freight thereon," the receiving of the goods under that bill, whether by the original consignee, or any assignee or indorsee of the bill, is evidence of an obligation to pay the freight.<sup>2</sup> And if a consignee assigns and indorses over the bill of lading, and the indorsee takes the goods, the original con-

to the goods by the fault of the carrier exceeded the freight, the libel was dismissed. *Bearse v. Ropes*, 1 Sprague, 331. See also *Zerega v. Poppe*, Abbott, Adm. 397; *Kennedy v. Dodge*, U. S. D. C. New York, 1867, *Shipman*, J.

<sup>1</sup> *Roccus*, n. 81, cited by Lord *Mansfield*, in *Luke v. Lyde*, 2 Burr. 882, 889; *Knox v. The Ninetta*, Crabbe, 534, 544; *Arthur v. Sch. Cassius*, 2 Story, C. C. 81. It was held in the case of *The Ship Panama*, Olcott, Adm. 343, 363, that where freight was paid in advance, and the goods were not delivered, the owner had a lien on the ship for the freight and the value of the goods. But this is certainly inconsistent with the cases above cited, and with the subsequent case, decided by the same learned judge, of *Thatcher v. McCulloh*, Olcott, Adm. 365. See also *The Joshua Barker*, Abbott, Adm. 215; *Bazin v. Richardson*, U. S. C. C. Penn. 1857, 20 Law Rep. 129, 5 Am. Law Reg. 459.

<sup>2</sup> From the earlier cases it would be inferred that the fact of an acceptance of the goods by the consignee, or his indorsee, under a bill of lading, containing the clause in question, raised a legal presumption that the consignee or his indorsee had made a contract to pay the freight. *Dougal v. Kemble*, 3 Bing. 383; *Cock v. Taylor*, 13 East, 399; *Scaife v. Tobin*, 3 B. & Ad. 523; *Jesson v. Solly*, 4 Taunt. 52. In *Merian v. Funck*, 4 Denio, 110, the court said: "It is well settled that when the goods, by the terms of the bill of lading, are to be delivered to the consignee, or to his order, on payment of freight, the party receiving them, whether a consignee or an indorsee, to whom the bill of lading has been transferred by the consignee, makes himself responsible for the payment of freight." See also *Smith v. Flowers*, 6 Mart. La. 12; *Shaw v. Thompson*, Olcott, Adm. 144. In *Sanders v. Vanzeller*, 4 Q. B. 260, it was held, that the reception of the goods by a consignee, or an indorsee, under the indorsement, would be evidence for the jury, from which they would be warranted in finding that the consignee or indorsee thereby contracted to pay freight, but that no contract would arise by implication of law. See also *Zwilchenbart v. Henderson*, 9 Exch. 722, 25 Eng. L. & Eq. 560; *Möller v. Young*, 5 Ellis & B. 755, 34 Eng. L. & Eq. 92, reversing the same case in the Queen's Bench, 5 Ellis & B. 7, 30 Eng. L. & Eq. 345; *Kemp v. Clark*, 12 Q. B. 647; *The Sch. Treasurer*, 1 Sprague, 473; *Swett v. Black*, 2 Sprague, 49; *Allen v. Bareda*, 7 Bosw. 204; *Wooster v. Tarr*, 8 Allen, 270.

signee is not bound to pay the freight; <sup>1</sup> not even if the goods are put into a public store, under a general order to discharge the ship, before the bill of lading is indorsed. <sup>2</sup> If an intermediate consignee is in any event liable for freight, he can deduct from the freight due the amount of any damage previously done to the goods. <sup>3</sup> Under the Bills of Lading Act of 18 & 19 Vict. c. 111, the rights and liabilities of the consignee or indorsee pass from him by indorsement over to a third person. <sup>4</sup> But the assignee has been held liable in a case where the bill of lading had not the word "assigns" in it. <sup>5</sup> The mere receipt of the goods by one actually the owner of them, might lay him under an obligation to pay for bringing them; but not the receipt by one who is not owner, unless he receives them under an authority *conditioned* to pay the freight.

And one who is only an agent of the consignee and is known to the master to be no more, does not become personally liable by receiving the goods, and entering them at the custom-house in his own name. <sup>6</sup> But if goods are consigned to A, care of B, or to B, for A, "he or they paying freight," etc., B is not personally liable for freight on receiving them. <sup>7</sup> And if one who is actually indorsee of the bill of lading, obtain the goods, not under the bill of lading, but by some other means, as by an order of the consignee, the consignee himself may be liable, but his indorsee would not be liable for freight; unless a custom on his part to take goods in this way and pay freight for them, suffices to raise

<sup>1</sup> *Cock v. Taylor*, 13 East, 399; *Tobin v. Crawford*, 5 M. & W. 235, s. c. affirmed in the Exchequer Chamber, 9 M. & W. 716; *Dougal v. Kemble*, 3 Bing. 383; *Trask v. Duvall*, 4 Wash. C. C. 181; *Merian v. Funck*, 4 Denio, 110, s. c. affirmed on appeal, 1 How. Ct. App. 656.

<sup>2</sup> *Merian v. Funck*, 4 Denio, 110, 1 How. Ct. App. 656; *New York Nav. Co. v. Young*, 3 E. D. Smith, 187.

<sup>3</sup> *Davis v. Pattison*, 24 N. Y. 317.

<sup>4</sup> *Smurthwaite v. Wilkins*, 11 C. B. N. S. 842; *Lewis v. M'Kee*, Law Rep. 2 Ex. 37.

<sup>5</sup> *Renteria v. Ruding*, Moody & M. 511.

<sup>6</sup> *Ward v. Felton*, 1 East, 507.

<sup>7</sup> *Amos v. Temperley*, 8 M. & W. 798. See also *Grove v. Brien*, 8 How. 429; *Miner v. Norwich R.* 32 Conn. 91. But a contrary decision was given in *Canfield v. Northern R.* 18 Barb. 586. And see *Hindsell v. Weed*, 5 Denio, 172.

the implied assumpsit.<sup>1</sup> But if he obtain the goods under the bill of lading, so as to be liable for the freight, he will continue liable although he has delivered over the goods or their proceeds wholly to the consignee before a demand for freight was made upon him.<sup>2</sup>

These remarks upon the effect of the bill of lading and an indorsement of it, and receipt of the goods under it, seem to be true and applicable only where there is no charter-party.<sup>3</sup> It would seem, however, to be an obvious and certain conclusion from established principles, that if a master delivers goods to any party, with notice to him that he should look to him personally for freight, and the party accepts the goods and receives them with this notice, he becomes thereby liable. The only ground of exception would be, that this party had, by his bargain, an absolute right to receive the goods, without any payment of freight, and the master, consequently, had no right whatever to withhold them for want of payment.

When the consignor is owner of the goods he is liable for the freight.<sup>4</sup> And he is now held liable as the contracting party, although he does not own the goods and the carrier has waived his lien on the goods by delivering them.<sup>5</sup> If the carrier is in fault in not collecting the freight he cannot afterwards call upon the consignor for it.<sup>6</sup> But if he may deliver the goods without demanding freight,<sup>7</sup> it is difficult to see how he can be guilty of any fault towards the consignor, for it seems to be well settled that, when

<sup>1</sup> *Wilson v. Kymer*, 1 M. & S. 157. And in *Coleman v. Lambert*, 5 M. & W. 502, it was held, that, although generally a consignee is not liable for freight when there is no bill of lading, yet if the plaintiff can show prior dealings with him, and that he paid freight on those occasions, this will be evidence that he contracted to pay freight, and he will be held liable.

<sup>2</sup> *Bell v. Kymer*, 5 Taunt. 477, 3 Camp. 545.

<sup>3</sup> See *Moorsom v. Kymer*, 2 M. & S. 303.

<sup>4</sup> *Holt v. Westcott*, 43 Maine, 445.

<sup>5</sup> *Wooster v. Tarr*, 8 Allen, 270. See *Jobbitt v. Goundry*, 29 Barb. 509; *Fox v. Nott*, 6 H. & N. 630.

<sup>6</sup> *Thomas v. Snyder*, 39 Penn. State, 317. Coal was shipped to A or his assigns, "he or they paying freight" unto B, the owner of the boat. On delivery of the coal neither B nor any agent of his was present to receive the freight, and by the subsequent failure of the assignees it was lost. Held that the consignor was not liable for the freight.

<sup>7</sup> *Wooster v. Tarr*, 8 Allen, 270.



there is a charter-party, this is evidence of an express contract on the part of the shipper to pay freight; and the clause in the bill of lading respecting the payment of freight by the consignee is inserted for the benefit of the master, and not of the consignor. And where there is no charter-party, but only a bill of lading, it seems that this amounts to, and imports, an implied contract on the part of the shipper to the same effect.<sup>1</sup>

Sometimes the freight money is paid in advance, in whole or in part, or other advances are made to the owner of the ship. Then, if the goods are not delivered, or the voyage not performed, under circumstances which would give the ship-owner no right to claim freight if it had not been paid, the question arises whether he is bound to pay it back. But this question, although not unfrequently attended with some difficulty, is a question of fact rather than of law; and the difficulty is not so much one of knowing what the true principles are, as in what manner they shall be applied.

It is now quite certain, that if the payment be merely a payment of freight in advance, it must be repaid if freight is not earned.<sup>2</sup>

<sup>1</sup> *Roberts v. Holt*, 2 Show. 443; *Penrose v. Wilks*, Abbott on Shipping, 415; *Tapley v. Martens*, 8 T. R. 451; *Marsh v. Pedder*, 4 Camp. 257; *Christy v. Row*, 1 Taunt. 300; *Shepard v. De Bernales*, 13 East, 565. In *Drew v. Bird*, *Moody & M.* 156, Lord *Tenterden* said that where there was no charter-party, and the goods were by the bill of lading to be delivered to a party other than the shipper, or to the assigns of such other party, he or they paying freight, the shipper was not liable, if the goods were delivered without payment of freight, unless there were some additional circumstances to show a contract between him and the ship-owner. This case was declared not to be law, by *Parke, B.*, in *Sanders v. Vanzeller*, 4 Q. B. 260, 288. The true rule, which has been universally followed, is laid down in *Domett v. Beckford*, 4 B. & Ad. 521, where it was held, that the only difference between a case where there was a charter-party, and one where there was not, consisted in this alone, that, in the former case, by the charter-party there was an express contract on the part of the shipper, and in the latter, an implied one. See also *Blanchard v. Page*, 8 Gray, 281; *Barker v. Havens*, 17 Johns. 234; *Spencer v. White*, 1 Ired. 236; *Grant v. Wood*, 1 Zab. 292; *Hayward v. Middleton*, 3 McCord, 121. The same rule applies to a case of demurrage. *Harrison v. Spaeth*, 23 Law T. 155, 28 Eng. L. & Eq. 132. In *Collins v. Union Transp. Co.* 10 Watts, 384, it is said that the condition was introduced for the benefit of the consignor. The word *not* was omitted before *introduced* by a mistake of the printer. See *Layng v. Stewart*, 1 Watts & S. 222.

<sup>2</sup> In an anonymous case, 2 Show. 283, *Saunders, C. J.*, is reported to have said: "Advance-money paid before, if in part of freight, and named so in the charter-party, although the ship be lost before it come to a delivering port, yet

And if the sums paid to the master or ship-owner are but loaned to the ship-owner, then they must be accounted for as loans; that is repaid, with deduction of freight that may become due, and no deduction, if no freight becomes due.<sup>1</sup> But it is quite as certain that the parties may make a different agreement. The shipper may say, if you will take my goods, I will pay you now so much money, and you may keep it whether you carry the goods to their destined port or not.

wages are due according to the proportion of the freight paid before, for the freighters cannot have their money." This doctrine is, however, neither sanctioned by the early maritime writers, nor by modern adjudications. See Cleirac, *Us et Coustumes de la Mer*, p. 42; *Ord. de la Marine, du Fret*, art. 18; Valin, *Com. sur Ord.* p. 661; Pothier, *Charte-Partie*, n. 63; Roccus, n. 80. Some writers are of the opinion that if there is no fault in the master a *pro rata* freight will be due. Straccha, *De Nav.* 3, n. 24; Loccenius, *De Jure Maritimo*, lib. 3, ch. 6, § 11; Roccus, n. 81. In *Pitman v. Hooper*, 3 Sumner, 50, 66, Mr. Justice Story said: "In the ordinary cases of freight paid in advance, I do not understand, that if the voyage is not performed the owner can, without an express stipulation to the purpose, retain it, but the shipper is entitled to recover it back." See also *Mansfield v. Maitland*, 4 B. & Ald. 582; *Watson v. Duykinck*, 3 Johns. 335; *Griggs v. Austin*, 2 Pick. 20; *Leman v. Gordon*, 8 Car. & P. 392, per Lord Abinger, C. B.; *Brown v. Harris*, 2 Gray, 359; *Minturn v. Warren Ins. Co.* 2 Allen, 86; *Benner v. Equitable Ins. Co.* 6 Allen, 222; *Phelps v. Williamson*, 5 Sandf. 578; *Cope v. Dodd*, 13 Penn. State, 33; *The Zenobia*, Abbott, Adm. 80; *Giles v. The Brig Cynthia*, 1 Pet. Adm. 203, 206; *Howland v. The Brig Lavinia*, id. 123, 126; *Mulloy v. Backer*, 5 East, 316; *Gillan v. Simpkin*, 4 Camp. 241; *The Ship Panama*, Olcott, Adm. 343, 361. In *Mashiter v. Buller*, 1 Camp. 84, the voyage was from London to Lisbon. By the bills of lading freight was payable in London. Lord *Ellenborough* held that there was a substitution merely of London as the place of payment in the place of Lisbon, but that the performance of the voyage was not dispensed with, and that if freight had been paid on shipment, as the voyage had never been completed, it might have been recovered back. In the case of *The Pacific*, 1 Blatchf. C. C. 569, the owner of the ship contracted to take the libellant as a cabin passenger from New York to California. Not more than fifty other passengers were to be taken, in order that there might be room for ventilation and exercise. After the passage-money was paid the libellant went on board, and found that seventy-two cabin passengers were engaged, and that the vessel was thereby overcrowded, and dangerous to health. He therefore refused to go. Held, that he might recover back his passage money, and also damages for the breach of the contract. But if the passenger or shipper cause the non-performance of the contract, the passage-money or freight cannot be recovered back. *Detouches v. Peck*, 9 Johns. 210; *Giles v. The Brig Cynthia*, 1 Pet. Adm. 207, note; *Griggs v. Austin*, 3 Pick. 20.

<sup>1</sup> *Manfield v. Maitland*, 4 B. & Ald. 582, 586, per *Bayley, J.*

This would, strictly speaking, not be an agreement for freight; but it would be an agreement the parties had a right to make. And it might be proved by, or inferred from, circumstances. As if the ship-owner said, I will take your goods to Havre, and will charge twenty dollars a ton payable there, or fifteen dollars if you will pay it here, it might be competent for a jury to infer that the reason for asking so much less at home, was that the payment was not to be at any risk, but was to remain the ship-owner's at all events, and that the shipper paid the money with that understanding.<sup>1</sup> But, if the bargain is money for the carriage of goods,

<sup>1</sup> In *Andrew v. Moorhouse*, 5 Taunt. 435, the bill of lading stated that the freight was paid. The voyage was from London to the Cape. The broker who made the contract with the shipper, told him that the rate of freight was £5 paid in London, or £7 at the Cape, per ton. The court left it for the jury to say what was the intention of the parties, and they having found that the payment was not conditional on arrival, the court refused to set aside the verdict. The agreement in *Watson v. Duykinck*, 3 Johns. 335, was that the master should suffer the plaintiff to proceed in his vessel as a passenger, and to load on board for transportation goods to the value of six hundred dollars. *Kent*, C. J., held that this meant that the plaintiff should be received on board as a passenger, that he should load the goods on board, and that the master should make all due and *bonâ fide* efforts to transport them. But that he did not contract to deliver them; and that, therefore, the voyage being broken up, he was entitled to retain the freight. In *De Silvale v. Kendall*, 4 M. & S. 37, the charter-party stipulated that £120 should be paid to the defendant as freight for the outward cargo to Maranham, and as much cash as might be necessary for the ship's disbursements, to be advanced by the plaintiffs when required, free from interest or commission, and the residue of the freight should be paid on delivery of the goods at Liverpool. Lord *Ellenborough* held that the advancing of the freight free from interest, showed that it was not intended as a loan, and that the word "residue" imported that a part of the freight was to be advanced, and the remainder only was to abide the usual course of events. See also *Saunders v. Drew*, 3 B. & Ad. 445; *Blakey v. Dixon*, 2 B. & P. 321; *The John*, 3 W. Rob. 170, 177. In *Hicks v. Shield*, 7 Ellis & B. 633, the charter-party contained this clause, "cash for ship's disbursements to be advanced to the extent of £300 free of interest but subject to insurance." Held that this was an advance of freight and not a loan, and that it could not be recovered back on the loss of the vessel. Lord *Campbell*, C. J.: "If it is to be insured it must be for freight in advance, for a mere loan could not be insured; and if it is not a mere loan, but advance of freight, the plaintiff cannot recover it back." A similar construction was given to the following clause in *Jackson v. Isaacs*, 3 H. & N. 405, "freight payable by charterer's acceptance, on ship clearing the custom-house, subject to insurance." See also *Trayes v. Worms*, C. P. 1865, 12 Law Times, N. s. 547. In *Gillan v. Simpkin*, 4 Camp. 241, it was held, that, a custom being proved that in West India voyages the passage-money was

wherever payable, it will be held to be a contract of affreightment, subject to the whole law of freight, unless a different bargain can be shown by the ship-owner, to authorize him to retain money paid to him when freight is not earned.<sup>1</sup> Whether the master or owner has a right to retain money thus paid in advance, is said to be always a question of law ;<sup>2</sup> but it is so, we apprehend, only so far as it is made so by the rule that all questions of construction are for the court.

The master may not in all cases have the right to take the freight-money in advance, so as to preclude his owners from suing the shippers for it, in case he runs off with it, but his authority to receive it may be inferred from subsequent payments made to him on that account, with the approbation of the owners.<sup>3</sup>

If a consignee, or other party, entitled to goods, be compelled to pay more than he is legally bound to pay, in order to get possession of them, he may recover it back ; unless prevented by the rule that money paid in mistake or ignorance of the law cannot be recovered back.<sup>4</sup>

It is usual to agree what shall be paid for freight, and to express this in the bill of lading ; but if it is not agreed, or expressed, the amount may be determined in the common way, by showing what the service is worth ;<sup>5</sup> and usage would have controlling influence upon this question. Under a bill of lading stating that the freight is so many pounds sterling, it has been held that the pound is to be estimated at the legal rate, \$4.44.<sup>6</sup> It is now, however, usually provided that freight shall be paid by bankers' bills of exchange at current rates on the day of delivery, or the day of the ship's arrival.

The universal law of illegal contracts, which declares them void, and permits no valid claim to grow out of them, or rest upon them,

retained whether the voyage was broken up or not, the master might retain it at all events. See also *Watson v. Duykinck*, 3 Johns. 335. But the custom cannot be proved by particular instances. *Cope v. Dodd*, 13 Penn. State, 33.

<sup>1</sup> *Mashiter v. Buller*, 1 Camp. 84.

<sup>2</sup> *Wigman v. Mactier*, 1 Gill & J. 150.

<sup>3</sup> *Drummond v. Winslow*, 38 Maine, 208.

<sup>4</sup> *Geraldes v. Donison*, Holt, N. P. 346 ; *Brown v. North*, 8 Exch. 1, 16 Eng. L. & Eq. 486 ; *Chamberlain v. Reed*, 13 Maine, 357.

<sup>5</sup> *Bastard v. Bastard*, 2 Show. 81.

<sup>6</sup> *The Patrick Henry*, U. S. D. C. New York, 1867, *Shipman*, J.

applies also to the contract of freight. It follows, therefore, that no freight can be earned by an illegal voyage; and this applies to voyages for smuggling or contraband against the laws of the country to which the ship belongs,<sup>1</sup> and to sailing under a license from the enemy.<sup>2</sup> But the illegality must spring from a violation, intended or actual, not of the laws of a foreign country, but of those of the country to which the vessel belongs, and in which the question is raised. For, generally at least, the tribunals of no country take notice of the revenue laws, or other merely municipal laws of any foreign country.<sup>3</sup>

The owner of a ship with a cargo on board, may sell the ship, and the question will arise, Who then is entitled to demand the freight? Generally, if a ship is sold before the voyage begins, the right to freight passes to the buyer, who alone can claim it. But if the ship is sold during the voyage, only the seller can claim the freight of the shipper, even if his bargain with the buyer obliges him to pay over the freight to him. But if the shipper knows this bargain and has consented to it, he becomes, as it were, a party to it, and then the buyer may claim the freight directly of him.<sup>4</sup>

<sup>1</sup> In *Muller v. Gernon*, 3 Taunt. 394, the court said that freight was the reward which the law entitled the plaintiff to recover for bringing goods lawfully into the country upon a legal voyage. See also *Blanck v. Solly*, 8 Taunt. 89.

<sup>2</sup> See *The Julia*, 1 Gallis. 594, 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Hiram*, 8 Cranch, 444; *Craig v. United States Ins. Co.* Pet. C. C. 410; *The Ariadne*, 2 Wheat. 143; *The Langdon Cheves*, 4 Wheat. 103, 2 Mason 58.

<sup>3</sup> *Gardiner v. Smith*, 1 Johns. Cas. 141; *La Jeune Eugenie*, 2 Mason, 409; *Richardson v. Maine F. & M. Ins. Co.* 6 Mass. 102; *Kohn v. Sch. Renaissance*, 5 La. Ann. 25. See also *Holman v. Johnson*, 1 Cowp. 341; *Biggs v. Lawrence*, 3 T. R. 454; *Ludlow v. Van Rensselaer*, 1 Johns. 94; *Planché v. Fletcher*, 1 Doug. 251; *Pellecat v. Angell*, 2 Crompt. M. & R. 311.

<sup>4</sup> We have seen (*ante*, p. 193, n. 1) that the indorsee of a bill of lading cannot sue, in his own name, on the bill of lading, for a breach of the contract, and the same principle is applicable in the present case. The respective parties to the contract can alone sue for breach of it. If, therefore, the vessel is sold before the voyage begins, and the contract of affreightment is made by the vendee and shipper, of course the vendee can sue for a breach; but if the vendor should appear by the bill of lading to be the contracting party, it would follow that the action must be brought in his name. Thus in *Morrison v. Parsons*, 2 Taunt. 407, the plaintiff, the owner of a vessel, contracted with the defendants, by a charter-party, that the vessel should go to Stockholm and there load a cargo for Plymouth. Subsequently, but before she sailed, he assigned the ship to the master, but no mention was made of the charter-party or of the freight. After she sailed the

And a mortgagee who does not take possession, is not entitled to the freight, unless some special bargain makes him so.<sup>1</sup>

If a ship be lawfully captured, the captor acquires all the rights of the owner, and among them the right to freight; but on the same conditions, that is, of completing the voyage, safe delivery, etc.<sup>2</sup> If the captor injure the property, he is liable after

plaintiff made an assignment to one Hamilton of the freight for a debt. Hamilton gave notice to the defendants not to pay freight to any one but himself; they however paid it to the master. The plaintiff brought this action in his own name for the benefit of Hamilton. It was held that by the assignment to the master the freight to become due passed, though he could not have brought an action on the charter-party in his own name. See also *Lindsay v. Gibbs*, 22 Beav. 522. In *Pelayo v. Fox*, 9 Barr, 489, it was held that where the transfer was made after the arrival of the vessel at her port of destination, but before the delivery of the cargo, the transferee would be entitled to freight, as against the assignees of the former owner, by a subsequent assignment. But a covenant to pay freight in a charter-party does not pass by a bill of sale of the ship. *Spiltd v. Bowles*, 10 East, 279.

<sup>1</sup> *Chinnery v. Blackburne*, 1 H. Bl. 117, n.; *Brancker v. Molyneux*, 3 Scott, N. R. 332, 3 Man. & G. 84. See also *Alexander v. Simms*, 5 De G. M. & G. 57, 27 Eng. L. & Eq. 288. In *Gardner v. Cazenove*, 1 H. & N. 423, 38 Eng. L. & Eq. 330, the plaintiff, the owner of the vessel, sold her, payment to be made by a draft payable twelve months after date. Shortly before it became due, the plaintiff agreed to renew it on condition that the vessel should be transferred to him as security. This was accordingly done, and the plaintiff was registered at the custom-house as sole owner. The vessel was at that time on a voyage, and after the transfer performed a separate voyage in which the freight in dispute was earned. The bill was never paid, and the plaintiff subsequently took possession. Held that the transfer was in effect a mortgage, and as the plaintiff had never taken possession he was not entitled to freight. But he is entitled to the freight accruing after he has taken possession. *Kerswill v. Bishop*, 2 Crompt. & J. 529, 2 Tyrw. 602; *Dean v. McGhie*, 12 Moore, 185, 2 Car. & P. 387, 4 Bing. 45; *Langton v. Horton*, 5 Beav. 9, 19, per Ld. *Langdale*, M. R.; even though he does not take possession till after the vessel arrives in port, provided the goods have not been delivered. *Cato v. Irving*, 5 De G. & S. 210, 10 Eng. L. & Eq. 17. In this case it was also held that the mortgagee was obliged to account for his share of the expenses of the voyage.

<sup>2</sup> The law was stated with great accuracy by Sir William Scott, in the case of *The Diana*, 5 Rob. Adm. 67, 71. He said: "There are two rules on this subject equally general. The first is, that if goods are not carried to their original destination, within the intention of the contracting parties, freight *shall not* be due; and on this ground, that the contract not being completed, either in substance or form, the speculation of the party has not been productive. The benefit of the contract is lost, and the party has to provide another vehicle, to carry on the goods to the port of their destination. In some cases, indeed, it may happen that

claim by way of set-off.<sup>1</sup> And if the shipper has advanced money to the master to be accounted for in settlement of freight, he may claim allowance for this advance in settlement with the captor.<sup>2</sup>

The contract for the carriage of passengers is, in general, governed by the same rules which regulate the transportation of goods.<sup>3</sup> Sometimes the passage-money is the master's perquisite or privilege. If so, and he dies after making a bargain and before the voyage begins, his personal representatives are entitled to the benefit of the bargain, that is, to the passage-money. But his successor may retain the money which he receives for passage-money on bargains made by himself.<sup>4</sup> And it is said, that if the passenger, in compliance with an established usage, pays his passage-money in advance, it is returnable to him if the voyage never begins, but not if it begins and is interrupted and never finished.<sup>5</sup>

It has been made a question whether, at the port of ultimate destination, if the goods arrive so injured as to have lost their

the port to which the goods are brought may prove more beneficial, and afford a better market. But the court does not enter into the minutiae of such calculations, which would be attended with great trouble in the inquiry, and much uncertainty in the result. It takes the presumption arising from destination only, and founds upon it the general rule, that, in such a case, the claimant shall receive restitution of his goods without the burden of freight. The other rule, equally general, is, that when the contract is executed, by bringing the cargo to the place of destination, the captor, to whom the vessel is condemned, shall be entitled to the freight which has been earned. He stands in the place of the owner of the ship, and is held entitled to the price of the services which have been performed in the execution of the contract." See also *The Vrow Anna Catharina*, 6 Rob. Adm. 269; *The Fortuna*, 4 Rob. Adm. 278; *The Fortuna*, Edw. Adm. 56. Where a cargo has been brought to the country, but not to the port of destination, it has been held that the captors are entitled to freight. *The Vrouw Henrietta*, 5 Rob. Adm. 75, note; *The Racehorse*, 3 id. 101. See, however, *The Wilemina Eleonora*, id. 234.

<sup>1</sup> *The Fortuna*, 4 Rob. Adm. 278, 282.

<sup>2</sup> *The Constantia Harlessen*, Edw. Adm. 232.

<sup>3</sup> *The Zenobia*, Abbott, Adm. 80; *Brown v. Harris*, 2 Gray, 359; *Griggs v. Austin*, 3 Pick. 20; *Howland v. The Brig Lavinia*, 1 Pet. Adm. 123, 125; *Watson v. Duykinck*, 3 Johns. 335; *Mulloy v. Backer*, 5 East, 316, 321; *United States v. The Owners of the Thomas Swan*, U. S. D. C. South Carolina, 19 Law Reporter, 201, 206.

<sup>4</sup> *Siordet v. Brodie*, 3 Camp. 253. But if his successor expend money in purchasing stores for such passengers, he will be considered the agent of the representatives for that purpose, and they must repay him. id.

<sup>5</sup> *Gillan v. Simpkin*, 4 Camp. 241. See *ante*, p. 210, note 2; p. 213, note 1.

mercantile value, the shipper may not there abandon them to the master, and pay no freight.<sup>1</sup> We consider it, however, quite settled as the law of this country, that if the goods arrive in specie, the shipper must pay freight for them, whatever be their condition or value.<sup>2</sup> If that value has been lost or diminished by the fault of

<sup>1</sup> See *Le Guidon*, ch. 7, art. 11; *Ord. de la Mar.*, liv. 3, tit. 3, Fret, art. 25 and 26; *Code de Commerce*, art. 310; *Molloy, de Jure Maritimo*, book 2, ch. 2, § 14; *Pothier, Charte-partie*, n. 60; *Boulay Paty*, tom. 2, 488. There is a dictum of Lord *Mansfield* in *Luke v. Lyde*, 2 Burr. 882, 887, which tends to sustain the right of the shipper to abandon his goods for the freight. He said: "As to the value of the goods, it is nothing to the master whether the goods are spoiled or not, provided the merchant takes them; it is enough if the master has carried them: for by doing so, he has earned his freight; and the merchant shall be obliged to take all that are saved, or none; he shall not take some and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons he is excused freight, and he may abandon all, though they are not all lost." This doctrine has not been followed in this country. *Griswold v. N. Y. Ins. Co.* 3 Johns. 321, 328; *Brown v. Clayton*, 12 Ga. 575. See also the opinion of Mr. Justice *Livingston*, in the same case on a former trial, 1 Johns. 205, 213; *Whitney v. N. Y. Firemen Ins. Co.* 18 id. 208.

<sup>2</sup> "Now nothing is better founded in the law on this subject than that the shippers are bound to pay the full freight for the voyage, if the cargo is carried to the port of destination, and specifically remains, notwithstanding at its arrival it is, by reason of sea-damage, utterly ruined and worthless." Per *Story, J.*, in *Jordan v. Warren Ins. Co.* 1 Story, 342, 353. See also *M'Gaw v. Ocean Ins. Co.* 23 Pick. 405, and cases in note *supra*. In *Lord v. Neptune Ins. Co.* 10 Gray, 109, insurance was effected on the freight of the barque *Dana*, from New York to Havre. On the third day out, the ship met with a peril and was obliged to put back to New York, where the cargo was discharged in order to repair the vessel, and sold. It would have taken several months to have prepared the cargo by drying for reshipment, and it was conceded that the master acted for the benefit of all concerned in selling it. The court held that, under these circumstances, the insured could not recover. *Shaw, C. J.*, in delivering the opinion of the court, said, p. 114: "The question therefore is not whether the flour, grain, and other articles would have been of any or what value, or of sufficient value to pay the freight, but whether on such reshipment and arrival, they would have remained in specie, as flour, wheat, bacon, palm-leaf, etc. If so, then it is clear that they were not so totally lost that the plaintiffs were prevented, by the peril insured against, from carrying them and earning the freight on them." See also *Ogden v. Gen. Mut. Ins. Co.* 2 Duer, 204; *Hugg v. Augusta Ins. Co.* 7 How. 595. In *Steelman v. Taylor*, U. S. D. C. Mass. 19 Law Reporter, 36, an action was brought to recover the freight of one hundred and nineteen tons of coal. This amount was laden on board at Philadelphia, but only one hundred and ten and a fraction were delivered. The court being of opinion that this difference was owing to causes over



the master, or without his fault, but from a cause for which he is responsible, then, as we have already said, the shipper may claim compensation; but he must pay freight.<sup>1</sup>

A more difficult question arises where the barrels or boxes in which the goods *were*, arrive, but there are no goods in them; as where wine or oil or molasses leaks out, or sugar or salt melts and washes out; but the barrels or boxes arrive in as good condition as when put on board. Is freight now to be paid?<sup>2</sup> Our answer would be that goods could scarcely perish in this way, except either by a cause for which the ship is answerable, and then the goods should be paid for, deducting freight; or by a peril of the sea, in which case it is clear that no freight is payable;<sup>3</sup> or by intrinsic defect or quality, as by decay, evaporation, or leakage, in which case the freight is due.<sup>4</sup>

which the master had no control, and for which he was not liable, decreed freight for the whole.

<sup>1</sup> See *ante*, p. 206, n. 2; p. 207, n. 1.

<sup>2</sup> The twenty-sixth article of the *Ordonnance de la Marine*, book 3, tit. 3, declares, that, "If goods put into casks, as wine, oil, honey, or other liquors, have leaked out to such an extent that the casks are empty, or nearly empty, the merchant may abandon them for the freight." This article is repeated in the *Code de Com.* art. 310, and was taken from *Le Guidon*, ch. 7, art. 11. Considerable discussion has ensued among the continental writers as to the meaning of this article. Valin and Delvincourt contend that if the casks arrive empty the merchant may abandon, though the loss by leakage be occasioned by reason of the insufficiency of the casks. On the other hand, Pothier (*Charte-partie*, 59), Boulay Paty (tom. 2, 488), and Ferrard are of opinion that the merchant cannot abandon if the loss is attributable to the insufficiency of the casks. Boucher, *Inst. du droit Maritime*, 289 (Paris, 1803), states the law as follows: "The captain cannot at all prevent an article from perishing or being injured by its inherent defect. He is, therefore, paid his freight in such a case. But he is to be treated as able to prevent loss by leakage, especially if he has declared that he received it in good order by his bill of lading. We ought, therefore, to attribute a leakage to bad stowage, which he is bound to guard against, and over which he has not exercised all the vigilance possible. For why does one hogshead leak more than another? It is from one of two causes,—either from its worse condition, or from worse stowage. He is not at liberty to make the former assertion. The latter may not indeed be treated as actually proven, but, inasmuch as it is a just presumption, he is to be discharged from the loss, but obliged to take the cask and the remnant for his freight."

<sup>3</sup> *Frith v. Barker*, 2 Johns. 327.

<sup>4</sup> *Nelson v. Stevenson*, 5 Duer, 538. In this case six hundred and twenty-four barrels of molasses were shipped on a voyage from New Orleans to New York

In regard to the freight of animals, this distinction seems to be taken. If the money is to be paid for the lading of the animals, then it is due for those which die on the voyage, as well as for those which are delivered alive. But if it is to be paid only for their transportation, then it is not due for those which are not delivered alive.<sup>1</sup> But the carriage of passengers or of animals hardly comes under the name of freight,<sup>2</sup> although the rules of law are the same in most respects.

On arrival eight barrels were found to be empty. The molasses was lost by leakage, fermentation, or inherent waste. The barrels were properly stowed and no negligence was imputable to the master or crew of the vessel. Held, that freight was due. The whole subject was discussed at length with great ability, and the court arrived at the following conclusions: That the owner of the goods is bound in the first place to furnish proper casks, and would presumptively be liable for a loss arising from their insufficiency. The effect of an unqualified bill of lading is to transfer this presumptive responsibility to the captain and owners of the vessel. And when the case presents nothing else, if the casks be delivered empty, or nearly so, and the actual cause of the leakage be unknown or conjectural, the owners of the vessel lose their freight. As, however, a bill of lading, treated as a receipt, is not conclusive, it is open to the ship-owner and master to prove explicitly that the casks were in fact unsound and badly made, and in such a case the original responsibility of the owner for their condition is restored and he is bound to pay freight. See also *Nelson v. Woodruff*, 1 Black, 156.

<sup>1</sup> See Molloy, de Jure Maritimo, book 2, ch. 4, § 8. It is also said by this learned writer, that if no agreement is made either for lading or transporting, then freight is to be paid for the dead as well as for the living. The same rules are laid down by Roccus, n. 76, 77, 78. The reason which he gives for the last rule is, that it does not appear precisely what was intended, and as no fault is shown on the part of the sailors, the contract remains entire, and the whole freight must be paid, because a doubtful contract must be construed against the shipper. See also Dig. 14, 2, 10. It is difficult to see on what principle of law this reasoning rests. The question is as to the interpretation of an implied contract. This must be determined by the intention of the parties; and the most natural and probable supposition is, that the shipper intended that his animals should be transported and not merely laden on board, and if the master had a different intention it was his duty to have mentioned it. But even if the intention of the parties is doubtful, the maxim *verba fortius accipiuntur contra proferentem*, would apply, for it has been held that where a carrier gives two notices limiting his responsibility, he is bound by that which is least beneficial to himself. *Munn v. Baker*, 2 Stark. 255. See also *Airey v. Merrill*, 2 Curtis, C. C. 8, and cases cited p. 11 of the report. And in *Wolcott v. Eagle Ins. Co.* 4 Pick. 429, 434, there is a *dictum* to the effect that freight is not due for animals which die on the passage, unless there is an express agreement to that effect. See, however, *Moffat v. East India Co.* 10 East, 468.

<sup>2</sup> *Lewis v. Marshall*, 7 Man. & G. 729. It was held, in this case, that where a

If a ship does not begin her voyage at all, does not break ground, no freight can be payable.<sup>1</sup> But after the voyage is begun, and an interruption occurs, whatever be the delay it causes, if it occur from a peril of the seas and without any default of the master, as by capture and recapture, embargo, or anything of the kind, if the vessel finally arrives, without avoidable delay, with the cargo, at the port of final destination, the whole freight is payable.<sup>2</sup>

## SECTION V.

### OF THE DELIVERY OF THE GOODS BY THE VESSEL.

The question of the entirety of the contract arises far more frequently when the goods are not delivered at the end of the voyage, or, in other words, when the whole of the voyage is not completed.<sup>3</sup> The goods must be delivered also in good condition, or if damaged, then from causes for which the ship-owner is not responsible.<sup>4</sup> There can be no action for freight unless delivery is either made, or prevented from being made, by the act or fault of the shipper

broker engaged with a ship-owner to provide a full cargo for the ship, the rates of freight for which should average forty shillings per ton, and the broker put goods on board the average freight of which amounted to only thirty-two shillings, the contract was broken, though the broker shipped passengers on board, whose passage-money added to the freight of the cargo averaged more than forty shillings. See also *Wolcott v. Eagle Ins. Co.* 4 Pick. 429; *Giles v. Brig Cynthia*, 1 Pet. Adm. 203, 206; *Howland v. Brig Lavinia*, id. 123, 126; and cases *ante*, p. 216.

<sup>1</sup> *Curling v. Long*, 1 B. & P. 634. See also *ante*, p. 179, note 1, and *post*, p. 242, note 1.

<sup>2</sup> *Davidson v. Gwynne*, 12 East, 381; *Beale v. Thompson*, 3 B. & P. 405, 420; *Moorsom v. Greaves*, 2 Camp. 627; *The Racehorse*, 3 Rob. Adm. 101; *The Hoffnung*, 6 Rob. Adm. 231; *Havelock v. Geddes*, 10 East, 555; *Ripley v. Scaife*, 5 B. & C. 167; *Bergstrom v. Mills*, 3 Esp. 36; *Hadley v. Clarke*, 8 T. R. 259; *Baylies v. Fettyplace*, 7 Mass. 325; *M'Bride v. Mar. Ins. Co.* 5 Johns. 299, 308. See also cases *post*, p. 231, note 3.

<sup>3</sup> See *ante*, p. 204, note 3.

<sup>4</sup> *Clark v. Barnwell*, 12 How. 272; *Malynes*, *Lex Mercatoria*, p. 102; *Boucher v. Lawson*, *Cases temp. Hardw.* 78, 183; *Parish v. Crawford*, 2 Stra. 1251; *Bellamy v. Russell*, 2 Show. 167; *Shields v. Davis*, 6 Taunt. 65, 4 Camp. 119; *Gibson v. Sturge*, 10 Exch. 622, 29 Eng. L. & Eq. 460; *Schureman v. Withers*, *Anthony*, 166; *Bartram v. M'Kee*, 1 Watts, 38; *Leech v. Baldwin*, 5 Watts, 446; *Humphreys v. Reed*, 6 Whart. 435; *Ewart v. Kerr*, 1 Rice, 203; *Ewart v. Kerr*, 2 M'Mullan, 141.

or consignee.<sup>1</sup> It has been held, however, that if the goods are tendered to the consignee at the proper end of the voyage, and the consignee is unable to receive them by reason of the action or prohibition of government, the whole freight is still earned and due; for here, the ship-owner has done all that he was bound to do.<sup>2</sup> Not so, however, if the ship is prevented from arriving at the port by a blockade, or any similar cause, for then the voyage is not finished in fact, nor can it be certain that it would have been finished and delivery made had there been no obstruction of this kind.<sup>3</sup> A usage to receive goods at the quarantine ground is

<sup>1</sup> In *Bradstreet v. Baldwin*, 11 Mass. 229, the cargo was seized by the government for the default of the shipper. The court held, that, "if there was evidence of a readiness on the part of the plaintiffs to deliver the cargo to the defendant, and the actual delivery and discharge of it had been prevented by the neglect of the defendant to receive it; or if the delivery was intercepted by an attachment, or seizure for a default of the defendant, the plaintiffs would be as well entitled upon this evidence, as they would be on proving an actual discharge and delivery of the cargo." In *Clendaniel v. Tuckerman*, 17 Barb. 184, the vessel arrived at her port of destination, and offered to deliver her cargo. The consignee was not ready to receive it. The vessel waited several days, and during the delay was capsized without any fault on the part of the master and crew, and part of the cargo was lost. Held, that full freight was earned. See also *Brown v. Ralston*, 4 Rand. 504, 9 Leigh, 532.

<sup>2</sup> *Morgan v. Ins. Co. of North America*, 4 Dall. 455; *Bradstreet v. Heron*, Abbott, Adm. 209. It has also been held that where the delivery of the goods is prevented by their wrongful seizure by custom-house officers, the ship-owners will not be excused, nor their contract with the shippers dissolved. *Gosling v. Higgins*, 1 Camp. 451; *Spence v. Chodwick*, 10 Q. B. 517. See also *Evans v. Hutton*, 4 Man. & G. 954. In *Howland v. Greenway*, 22 How. 491, s. c. *nom.* *The Griffin*, 4 Blatchf. C. C. 203, owing to the negligence of the master of the vessel, the goods were not entered on the manifest, and were consequently seized and confiscated by the custom-house officers. It was held that there was no delivery and that the ship-owners were liable for the loss. In *Brooks v. Minturn*, 1 Cal. 481, it was held that if a seizure by the revenue officers was illegal, full freight would be due; so if legal and occasioned by the fault of the consignee, but if caused by the fault of the ship-owner or his agents, though full freight would be due if the goods were finally delivered, the consignee might deduct any damages which he had suffered by the detention.

<sup>3</sup> *Hadley v. Clarke*, 8 T. R. 259; *Stoughton v. Rappalo*, 3 S. & R. 559; *Scott v. Libby*, 2 Johns. 336; *Lorillard v. Palmer*, 15 Johns. 14, 20; *Palmer v. Lorillard*, 16 Johns. 348; *Burrill v. Cleeman*, 17 Johns. 72; *Richardson v. Maine Ins. Co.* 6 Mass. 102; *Baylies v. Fettyplace*, 7 Mass. 325. In *Sims v. Howard*, 40 Maine, 276, goods were shipped from Philadelphia to Bangor. The bill of lading provided that if the river should be closed with ice, the cargo should be received

admissible as showing a compliance with the engagement to deliver at the port.<sup>1</sup> If a vessel, after her arrival in port, is ordered to perform quarantine, and the cargo is landed and stored in the quarantine ground, the shipper or consignee is bound to pay the expense of landing and storage.<sup>2</sup> And if it is the custom for the consignee, when the vessel is at quarantine, to send down persons at his own expense to pack and take care of the goods, a neglect on his part to do this will exonerate the master for damage to the goods occasioned by their coming on shore loose.<sup>3</sup> When a cargo is shipped to a foreign country and no particular port of delivery is mentioned, the presumption is that the general port of delivery of such cargoes in that country is the one meant.<sup>4</sup>

The general rule applicable to carriers and other persons contracting to deliver goods, is that a personal delivery is necessary.<sup>5</sup> But this rule does not apply to the case of ships, the usages of trade having constituted a delivery on the wharf with notice to the consignee sufficient.<sup>6</sup> The delivery must be on a wharf which

at Frankfort, or as near as the ice would permit. On arrival at F. the river was full of ice, and the captain refused to go further, but the vessel was taken to B. by the owners of part of the cargo, and as soon as this with a part of the goods in question was landed, the vessel was towed back to prevent her being frozen in. The rest of the goods were discharged and stored at F. Held, that freight was due.

<sup>1</sup> *Bradstreet v. Heron*, Abbott, Adm. 209.

<sup>2</sup> *Rice v. Clendinning*, 3 Johns. Cas. 183.

<sup>3</sup> *Dunnage v. Joliffe*, before Lord *Kenyon*, C. J. 1789, cited in *Abbott on Shipping*, 380.

<sup>4</sup> *Smith v. Davenport*, 34 Maine, 520.

<sup>5</sup> And in *Wardell v. Mourillyan*, 2 Esp. 693, it was held that a delivery of goods by a hoyman on the wharf to which he usually plied was not sufficient.

<sup>6</sup> In *Hyde v. Trent Nav. Co.* 5 T. R. 389, which was a case of carriage by land, *Buller, J.*, said: "When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of carrying the goods on land, and according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." The former part of this reason does not appear to be perfectly satisfactory, because a bill of lading is not merely "an undertaking to carry from port to port," but it is also a contract to deliver the goods to a specified person. The general question of delivery was much discussed in the case of *Cope v. Cordova*, 1 Rawle, 203, and the usages and customs of several foreign ports in relation thereto set forth at length. In this case the plaintiff was the consignee of ten crates of merchandise. As soon as the vessel was ready to unload, he sent a porter to receive them, with a permit and a list of the articles, and with authority to receive them, etc. On the twenty-second

is suitable for the cargo which is to be placed upon it; if then the goods are injured in consequence of the insufficiency of the wharf, the vessel is liable as if no delivery had taken place.<sup>1</sup> And al-

of the month one or more crates were delivered to the porter, and one or more on the two following days. The porter did not attend during the whole of these days but called repeatedly every day, and took away such as were delivered. One of the crates was landed on the twenty-third, but was not received by the porter, and it was not known what had become of it. It was held that the defendant was not liable.

In *Sutton v. Bowker*, 5 Gray, 416, the goods were by the bill of lading to be delivered "at the Essex Railroad wharf." The Essex Railroad Co. owned but one wharf, which was by the side of their road, above two bridges. The court held that, for the purpose of showing that a wharf called Phillips's wharf, below the bridges, was the wharf intended by the parties, evidence was admissible that that wharf was generally known as the Essex Railroad wharf, and was used by the railroad company to receive merchandise at; that more freight was charged at the port of shipment for vessels which had to pass drawbridges, than for those which had not; that this vessel had previously delivered goods to the same consignee at the lower wharf; and that the upper wharf was more difficult and dangerous of access, and could not be safely approached by vessels of this size.

In *The Brig Fittler*, U. S. D. C. Mass. 1866, *Lowell, J.*, the consignee of part of the cargo brought suit to recover damages for an alleged refusal of the master to land the goods at East Boston. The vessel arrived on a Saturday night. On Sunday an order was sent by the owners of the vessel to the master, directing him to haul to Union wharf. On Monday he hauled to Union wharf, made fast and discharged the tug-boat, and soon afterwards was ordered by the libellant to haul to East Boston. The libellant owned the greater part in bulk and value of the cargo, and was to pay the greater part of the freight. The question of the usage in such a case was gone into at great length. It was held that the delivery must be in accordance with the usage, and that, except in some particular trades, the consignees had the right to order the master to go to any wharf they pleased; that if no orders were given he could select a wharf; that if there were several consignees, those who had to pay the greater part of the freight might make the selection, but that the notice should be given in due season, and that after the vessel was at the wharf selected by the master it was not reasonable to require him to change. So, too, a usage for the master of the vessel to select the wharf is valid. *Dixon v. Dunham*, 14 Ill. 324.

<sup>1</sup> *Vose v. Allen*, U. S. D. C., N. Y., 2 Am. Law Reg. 563, *nom.* The Bark *Majestic*, 10 Legal Observer, 100. In this case a cargo of iron was unloaded on a pile dock, the master having notice that it was not strong enough to sustain it, and the vessel was held liable for the injury sustained by the wharf breaking through. Affirmed on appeal. *Vose v. Allen*, 3 Blatchf. C. C. 289.

In *Kennedy v. Dodge*, U. S. D. C. New York, *Shipman, J.*, which was a suit *in personam* for freight, the ship arrived in New York in August, 1866, with a general cargo, and was assigned a berth at pier No. 45, East River. The court found that the pier was a good one, with sufficient strength to have supported the

though the liability of the carrier may cease by the goods being put on the wharf, yet if they are taken on board again his liability revives.<sup>1</sup>

The goods must not be piled on the wharf promiscuously with those of other consignees, but the master must, as far as possible, separate the different consignments, so as to render them accessible to their respective owners.<sup>2</sup> In all cases the master is required to give notice to the consignee of the arrival of the vessel, and of his readiness to discharge the cargo;<sup>3</sup> and knowledge, therefore, casually acquired that the vessel has arrived and will discharge her cargo at a particular wharf, is not enough.<sup>4</sup> Generally, if a notice

cargo had it been properly placed thereon; that the cargo was discharged from time to time, and the owners of the goods had notice of the landing of that part which belonged to them, and took portions of it to their warehouse as was convenient; that before they had removed it all the master so overloaded the dock that it gave way and damaged the goods; that by a standing agreement between the libellants and respondents, when the latter had goods on the dock landed from ships owned by the libellants, and such goods remained on the dock over night, the master or agent of the ship employed a night watchman to watch the goods, at the expense of the respondents, and this was done in this case. Held that, notwithstanding there had been a constructive delivery of the goods, the owners of the vessel were liable for the acts of the master in overloading the pier. It was also held to be immaterial that the master had no notice or reason to suspect that the pier was not strong enough.

<sup>1</sup> The *Huntress*, Daveis, 82.

<sup>2</sup> The *Ship Middlesex*, U. S. C. C. Mass. 21 Law Reporter, 14.

<sup>3</sup> This doctrine is laid down in the early case of *Golden v. Manning*, 3 Wilson, 429, 2 W. Bl. 916, as follows: "There can be no doubt but carriers are obliged to send notice to persons to whom goods are directed, of the arrival of those goods within a reasonable time, and must take special care that the goods be delivered to the right person." See also *The Peytona, Ware*, 2d ed. 541, 2 Curtis, C. C. 21; *Salmon Falls Manufacturing Co. v. Bark Tangier*, U. S. C. C. Mass. 21 Law Reporter, 6; *The Ship Middlesex*, 21 Law Reporter, 14; *Ostrander v. Brown*, 15 Johns. 39; *Price v. Powell*, 3 Comst. 322; *House v. Schooner Lexington*, 1 N. Y. Leg. Obs. 4; *Gatliffe v. Bourne*, 4 Bing. N. C. 314, 5 Scott, 667, Arnold, 120, affirmed in the Exchequer Chamber, 3 Man. & G. 643, 3 Scott, N. R. 1, and in the House of Lords, 7 Man. & G. 850. In *Barclay v. Clyde*, 2 E. D. Smith, 95, goods were shipped from New York to Philadelphia. On arrival the carrier sent them by a cartman to the store of the consignee. When they reached the store they were found to be damaged, but it did not appear whether it was caused by the cartman or whether it happened on board the ship. It was held that the carrier's liability continued till the goods were delivered, and that the delivery on the wharf was not sufficient, as no notice had been given to the consignee.

<sup>4</sup> The *Ship Middlesex*, 21 Law Reporter, 14.

in the newspaper is relied on, it must be shown that the consignee read the notice.<sup>1</sup> If, however, the consignee is absent or cannot be found after diligent search, the want of notice is excused.<sup>2</sup> If the master has wrongfully omitted to sign a bill of lading, and has sailed without learning the names of the consignees, he cannot avail himself of his ignorance as an excuse for not giving notice of the landing of the goods.<sup>3</sup> But if it is the fault of the shipper that there is no bill of lading, notice published in a paper taken by the consignees is sufficient.<sup>4</sup> And it is the duty of the master, if no consignee is named in the bill of lading, to store the goods for the benefit of the owner.<sup>5</sup> And this is his duty generally, when the consignee refuses to receive the goods; and after the goods are on the wharf, the consignee has a reasonable time in which to inspect them, and determine whether or not he will accept the consignment. Till he does accept, he is not liable for freight.<sup>6</sup> If he refuses to accept he incurs no liability, and the master cannot leave the goods to perish, but is bound to store them for the

<sup>1</sup> *Kohn v. Packard*, 3 La. 224. In *Northern v. Williams*, 6 La. Ann. 578, no direct notice was given, but the answer did not set up want of it, and the court were of opinion that the consignee received the bills of lading, and saw the notice of the arrival in the papers, though there does not appear to have been any proof of this last fact.

<sup>2</sup> *Fisk v. Newton*, 1 Denio, 45. The consignee was a clerk in New York, having no place of business of his own, and his name was not in the directory. The agent of the carriers made diligent inquiry for him, but could not find him. He then placed the goods in the hands of storehouse keepers, who were then in good credit, and they gave a receipt for the same. After some months the consignee appeared, demanded the goods, and paid the freight on the receipt being given up to him. But as the storehouse keepers had failed, he sought to recover from the carriers. Held, that they were not liable. Mr. Justice *Jewett* said: "When goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business at the place of delivery, for and on account of the owner. When so delivered, the storehouse keeper becomes the bailee and agent of the owner in respect to such goods." See also *Mayell v. Potter*, 2 Johns. Cas. 371.

<sup>3</sup> *The Peytona, Ware*, 2d ed. 541, 2 Curtis, C. C. 21.

<sup>4</sup> *Medley v. Hughes*, 11 La. Ann. 211. And probably notice in any paper would, in such a case, discharge the vessel.

<sup>5</sup> *Galloway v. Hughes*, 1 Bailey, 558.

<sup>6</sup> *The Sch. Treasurer*, 1 Sprague, 473.



owner.<sup>1</sup> But he is not bound to give notice to the consignor of the refusal of the consignee to accept, unless such a course is reasonable under all the circumstances of the case; and this is a question for the jury.<sup>2</sup> The delivery must be on a proper day as regards the weather, and must also be on a business day,<sup>3</sup> and at a proper hour of such day; and a clerk or truckman in the employment of the consignees has no authority to bind the latter to receive the goods at an unusual time;<sup>4</sup> and the liability of the vessel continues till the consignee has had that reasonable time to examine the goods to determine whether he will accept them or not, as spoken of above. In general, the delivery must be *reasonable*, in time, place, and circumstance.<sup>5</sup>

<sup>1</sup> *Arthur v. Schooner Cassius*, 2 Story, 81; *Ostrander v. Brown*, 15 Johns. 39; *Chickering v. Fowler*, 4 Pick. 371. In this last case the action was brought on the bill of lading by the consignor. The consignee refused to accept the goods, and the master took no further care of them, and they accordingly perished. The court held, that if the consignee ordered the goods unconditionally, he was bound to accept them, and then the master would not be liable; but if not, the master should have stored them for the owner. If the carrier delivers the goods to a warehouseman, the nature of the delivery determines whether the warehouseman is to act as the bailee of the carrier or of the owner of the goods. If for the latter, the carrier cannot reclaim them of the warehouseman by tendering him the amount of his charges. *Hamilton v. Nickerson*, 11 Allen, 308. See also *Boilvin v. Moore*, 22 Ill. 318; *Lyons v. Hill*, 46 N. H. 49; *Steamboat Keystone v. Moies*, 28 Misso. 243; *Hathorn v. Ely*, 28 N. Y. 78; *Alabama R. v. Kidd*, 35 Ala. 209.

<sup>2</sup> *Hudson v. Baxendale*, 2 H. & N. 525.

<sup>3</sup> *Salmon Falls Co. v. Bark Tangier*, 21 Law Reporter, 6. It was held, in this case, that a delivery on Fast day was not good, there being evidence that for more than thirty years Fast day had not been considered a day of delivery. See also *Goddard v. Bark Tangier*; *Pearson v. Same*, 21 Law Reporter, 12. The case of *Goddard v. The Bark Tangier*, was taken to the Supreme Court of the United States, and it was there held that the evidence did not show that there was a general usage of the port of Boston, forbidding the unloading of vessels on that day, and there being no law of the State forbidding the transaction of business, it was held that the master had a right to continue the delivery of his cargo on that day. *Richardson v. Goddard*, 23 How. 28.

<sup>4</sup> *Goddard v. Bark Tangier*, 21 Law Reporter, 12.

<sup>5</sup> In *Price v. Powell*, 3 Comst. 322, which was an action brought by the consignor, it was held, that the liability of the carrier continued till the consignee had had a reasonable time in which to take away the goods. Notice was given late in the evening, and it was held that the consignee was not obliged to take away the goods before the next day, and that if they were injured in the night while

It has been held, that a usage to deliver goods without notice may be shown.<sup>1</sup> But a usage for a wharfinger to accept goods on behalf of the consignees, is not one which will be considered binding.<sup>2</sup> And, whatever the law may be in regard to a usage, it is clear that the parties may make a special contract in regard to the manner of delivery.<sup>3</sup> The goods should be plainly marked, so that

on the wharf, the carrier was liable. So, in *Segura v. Reed*, 3 La. Ann. 695, which was also an action by the consignor. After the delivery on the levee, and notice to the consignees, some of the goods were stolen. The court said: "The contract of the vessel is to deliver the goods to the consignee, and the responsibility continues until there is an actual delivery, or some act which is equivalent to or a substitute for it. Even assuming the general rule to be, that putting the goods on the wharf discharges the vessel, where there has been a notice to the consignees of the time and place of the delivery, it seems to us that this rule is not to be applied with such rigor against the consignee as to put the goods unqualifiedly at his risk from the very instant of landing them, when he has made repeated calls for them during the day, and the discharge is not made until an advanced hour of the day." The consignee in this case received notice between twelve and one o'clock on Saturday, and went himself, and sent his clerk at three to receive the cotton. It was not then delivered, and nothing was said in regard to the time when it would be delivered. It was put on the levee at four o'clock on that day. On Monday ten bales were missing. The carrier was held liable. See also *Northern v. Williams*, 6 La. Ann. 578.

<sup>1</sup> *Gibson v. Culver*, 17 Wend. 305; *Farmer's Bank v. Champlain Transp. Co.* 16 Vt. 52, 18 id. 131, 23 id. 186. But see *Price v. Powell*, 3 Comst. 322. In *Steamboat Albatross v. Wayne*, 16 Ohio, 513, a local usage regulating the mode of delivering goods at Memphis, was held not to be binding on shippers of goods from Cincinnati to that place, unless it was known to the merchants and shippers there generally. This was so held, on the ground that a practice which is unknown to those generally engaged in the trade, cannot be sustained as a usage, and cannot control the terms of a contract, because the parties to it cannot be presumed to have contracted with reference to the usage.

<sup>2</sup> *The Ship Middlesex*, 21 Law Reporter, 14. So in *Harkness v. Church*, 10 La. Ann. 64, it was held that a delivery by a carrier to a wharf-boat at the port of destination, without notice to the consignee, was not sufficient. But that, if the consignee paid the freight to the owner of the wharf-boat, which he had advanced, this would amount to a recognition of the authority of the wharf-boatman to receive the goods as the agent of the consignee. See also *Wayne v. Steamboat General Pike*, 16 Ohio, 421; *Steamboat Albatross v. Wayne*, id. 513.

<sup>3</sup> In the case of *The Grafton*, Olcott, Adm. 43, 1 Blatchf. C. C. 173, two hundred and sixty-seven bales of hemp were shipped from New Orleans to New York. Notice of the arrival was given, but the consignees, who were also the owners of the goods, refused to receive them on account of the weather, which

the consignee may be known; and if, without any fault on the part of the carrier, the owner sustains a loss in consequence of the illegible direction, the carrier is not liable.<sup>1</sup> But if the goods have been delivered to the owner and the freight paid, and the carrier afterwards takes them back without the knowledge of the owner, and delivers them to a third person who claims them, it is no defence to an action for the goods that they were not distinctly marked, although the carrier acted in good faith.<sup>2</sup>

In Pennsylvania it seems to be supposed that a delivery of goods at a foreign port differs from a delivery in the internal or coasting trade.<sup>3</sup> But this distinction does not appear to us to be warranted

they alleged was not suitable for the discharge of the cargo. The evidence showed that the day was one of good working weather after nine, A. M., that there were clear indications of rain about noon, and that the storm, which damaged the goods in the afternoon, came on abruptly, with but few minutes previous warning. Notwithstanding the refusal of the consignees to receive the goods, the ship began to unload them; but at a little before noon, an agreement was entered into between the consignees and the agents of the vessel, that the latter should cease to unload, if the consignees would take away what was already unloaded. The consignees took away a number of bales, but the ship continued to unload, and in the afternoon the bales on the wharf, and some of those which were taken away, but not stored, were damaged by rain. There was evidence that the number taken away was greater than that on the wharf at twelve, though the number stored was less. The court held that though generally a delivery on the wharf with notice was a delivery to the consignees, yet that the special agreement ought to have been carried out, and that all the bales taken away from the wharf, whatever their number, were to be considered as accepted by the consignees, but that they might recover for the damage done to the rest.

<sup>1</sup> This is in accordance with a *dictum* of Ware, J., in *The Huntress*, Daveis, 82. But if a carrier receives goods and gives a bill of lading for them specifying the name of the consignee, he is bound to deliver them, and should see that the goods are properly marked, if this is necessary. *Krender v. Woolcott*, 1 Hilton, 228. In *Bradley v. Dunipace*, in the Exch. Ch. 1 H. & C. 521, flour in sacks of different sizes, intended for two consignees, was sent on a vessel without any marks distinguishing the sacks for either consignee. The master gave a bill of lading promising to deliver to one consignee 467 bags of 35 tons and 9 cwt., gross. Held that he was bound to deliver the specified number of bags of such sizes as would come nearest to the weight mentioned. The Court of Exchequer was equally divided in this case. 7 H. & N. 200. See also *Rome R. v. Sullivan*, 25 Ga. 228; *The City of Dublin*, 1 Bened. Adm. 46.

<sup>2</sup> *The Huntress*, Daveis, 82.

<sup>3</sup> See *Cope v. Cordova*, 1 Rawle, 203. The case of *Hemphill v. Chenie*, 6 W. & S. 62, was decided on this ground. It was there held that the responsibility of

by law to the extent contended for. If the goods are to be transported over different parts of their route by carriers having no connection with each other, a notice by one carrier to another that the goods have arrived, and that he is ready to deliver them, is sufficient to exonerate him from liability as a carrier.<sup>1</sup>

A question of some difficulty has arisen, whether the contract of the ship-owner or master is so far an entirety that his liability continues till the whole consignment is out of the ship and ready for delivery. On the whole, we should say, that, if the consignee was notified that a part was ready for delivery, he would be obliged to take that part, and could not recover if, before all the goods were out, some were burned or otherwise destroyed or injured, on the wharf.<sup>2</sup>

a carrier on the Ohio does not cease upon the delivery of the goods on a wharf, and notice to the consignee. But when we look at the facts of this case we shall see that it differs in no respect from the well-settled rule of law applicable to contracts of affreightment generally. See *ante*, p. 226, n. 1. The action was brought by the consignor, and not by the consignee. The carrier put the goods on the wharf, gave notice to the consignee, and took no further care of them. The goods were probably stolen, and the carrier was held liable.

<sup>1</sup> *Gould v. Chapin*, 10 Barb. 612; *Northern R. v. Fitchburg R.* 6 Allen, 254. In *Gould v. Chapin*, the defendant, a carrier on the North River, had discharged the goods on his float in the basin at Albany, and had repeatedly given notice to the forwarders to take them away. The goods were destroyed by fire, after the lapse of a reasonable time for the forwarders to have taken them away. In 10 Barb. 612, the carrier was held not to be liable, but this decision was reversed on appeal. 20 N. Y. 259. See also *McDonald v. Western R.* 34 N. Y. 497; *Miller v. Steam Nav. Co.* 6 Seld. 431.

<sup>2</sup> The question came before Judge *Sprague*, in *Paine v. Bowker*, U. S. D. C. Mass. 1856. Three hundred and forty-nine barrels of flour were consigned to a firm in Boston. On the twenty-sixth of the month the consignees were notified that the ship would unload on that day, and the greater portion of the flour was landed on the wharf. The next morning twelve more barrels were landed. In the afternoon everything on the wharf was destroyed by fire. All the flour, with the exception of three barrels, which were afterwards tendered to the consignee, but not accepted, was on the wharf at the time of the fire. It was contended that the consignee was not bound to take away any of the barrels till the whole was delivered, but the court decided otherwise, and held, that the ship had earned her freight. This view is sustained by a *dictum* of *Merrick, J.*, in *Mansur v. New England Ins. Co.* 12 Gray, 520, 526; and by a *dictum* of *Wayne, J.*, in *Brittan v. Barnaby*, 21 How. 557. The point decided in this case was that the carrier could not demand the entire freight on delivery of a part of the goods. There are *dicta* in the case to the effect, 1st. That freight

The goods must be delivered at the port of destination, and therefore the vessel is not discharged by showing that the goods were delivered at an intermediate port, and were to be shipped from thence to the port of destination under a contract made by the defendant with another boat.<sup>1</sup>

By the custom of the river Thames the master of a vessel is bound to guard goods loaded into a lighter, sent for them by the consignee, until the loading is complete, and he cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them.<sup>2</sup>

is not payable until the goods are ready for delivery; 2d. That when the goods are ready for delivery, the freight must be paid before an actual delivery can be called for; 3d. That neither party can require from the other that merchandise shipped under one bill of lading shall be put up into parcels for delivery or for the payment of freight; 4th. That when the shipment is large, or, from the master's storage of it, it cannot be landed in a day, if he lands a part of it, his lien upon the whole gives him the power to ask from the consignee of the merchandise a satisfactory security for the payment of the entire freight, as called for by the bill of lading; 5th. That a security or arrangement is all that he can ask; 6th. That he may not demand that the whole freight of the shipment should be paid before the consignee has had the opportunity to examine his goods; 7th. That a ship is not bound to land an entire shipment in a day, for the proper stowage of the goods is the master's care, and he may do it in such a manner as may be most advantageous to the ship, taking care that it shall not be done to the injury of the goods, or in such a manner as to produce unreasonable delay in the delivery of them; 8th. That when landings of the same shipment are made on different days, if the shipper disregards the notice given to him that such will be the case, and he is not present to receive the goods, and has not made an arrangement to secure the payment of the freight, they may be stored for safe-keeping, at the consignee's expense and risk, in the ship-owner's name, to preserve his lien for the freight; 9th. That where the shipment is so large that it cannot be unloaded in one day, the master must so unload it that the *pro rata* freight can be ascertained.

It may, however, be doubted whether the consignee has not the right to refuse to pay any freight until he has examined the whole, as the part undelivered may be damaged to a greater extent than the whole freight. *Clark v. Masters*, 1 Bosw. 177; *Black v. Rose*, 2 Moore, P. C. N. s. 277.

<sup>1</sup> *Watts v. Steamboat Saxon*, 11 La. Ann. 43.

<sup>2</sup> *Catley v. Wintringham*, Peake, 150; see p. 183, n. 2. In *Abbott on Shipping*, 379, it is stated that it has been much contested whether the master is, by the usage, bound to take care of the lighter, after it is fully laden, until the time when it can properly be removed from the ship to the wharf. And that, at a trial of this question, it was held, that the master was not obliged to, citing *Robinson v. Turpin*, before Lord *Ellenborough*, C. J. But the action in this case

Where the quantity of the cargo is to be ascertained by weighing, the holder of the bill of lading has no right to insist that the certificate of a particular weigher, selected by himself, shall be conclusive.<sup>1</sup>

## SECTION VI.

### OF THE FORWARDING OF THE GOODS IN OTHER VESSELS.

As the ship-owner has thus no claim for freight until the whole voyage is completed, he has no lien on the cargo for *payment* of freight until then; but in the mean time he has a lien on the cargo for the *earning* of freight. That is, he has a right to hold a cargo once shipped on board his vessel, and to carry it to its destination, although circumstances may occur which will cause great delay, and perhaps great diminution of value.<sup>2</sup> It would seem from the cases, that the shipper may at any time reclaim his goods by paying full freight, especially if he adds compensation for damage, trouble, etc.; for the lien, or hold, of the ship-owner upon them is only for this purpose;<sup>3</sup> but, unless he chooses to do

was against the lighterman, and the plaintiff recovered. At a former trial the plaintiff had been nonsuited. Whether this former trial was against the master, is not stated, though it is to be inferred that it was.

<sup>1</sup> The Sch. Treasurer, 1 Sprague, 473.

<sup>2</sup> See *ante*, p. 179, n. 1; also *Tindal v. Taylor*, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210; *Clemson v. Davidson*, 5 Binn. 392; *McGaw v. Ocean Ins. Co.* 23 Pick. 405, 410; *Lord v. Neptune Ins. Co.* 10 Gray, 109. The case of *Small v. Moates*, 9 Bing. 574, also turned upon this point. The court there held that where a charterer bought goods, and placed them on board the vessel, the lien of the ship-owner immediately attached, and that, if the charterer sold them, before the vessel sailed, to a third party, and gave him bills of lading in the usual form, at the end of the voyage, the vendee would not be entitled to them on payment of freight, but the ship-owner would have a lien on them for the whole freight due under the charter-party. See also ch. 8, § 2, and next note *infra*.

<sup>3</sup> It is well settled that the master has a right, after the goods are shipped on board, to carry them to their port of destination and thus earn his full freight. Having this right, it has been determined that, at an intermediate port, the master may, if the shipper wishes his goods, give them up to him, and demand his full freight, or, if this is not paid, he may carry them on, and thus earn it. This grows out of the entirety of the contract. It is, however, another question, and one it seems to us susceptible of argument, whether the master is *obliged*, at the intermediate port, to give up the goods on the tender of full freight. There can

this, the ship-owner need not deliver them, although he is in port, damaged, and the cargo damaged and needing repair, which, with

be no question as to his *power* to deliver them up; but we are now considering whether he is so far bound to do this, that in default thereof he will be liable as a wrongdoer. It seems, however, to have been taken for granted by the majority of the authorities, that he has no option in the case; but the point has never been directly adjudicated upon, though it is referred to incidentally in numerous cases. Thus, Chancellor *Kent*, in *Palmer v. Lorillard*, 16 Johns. 348, 355, speaking of the contract of affreightment, said: "It is well understood in the English law, and in our own, that it is not in the power of one only of the parties to rescind a contract. Being mutually binding it requires mutual consent to dissolve it. The one party had no right to tender the cargo, nor the other to demand it, until the contract had been fulfilled, *unless, indeed, the demand was accompanied with the offer of the entire freight*. The one side had an interest in the conveyance of the goods, and the other in the payment of the freight, and the obligation to perform in the time and mode provided, was reciprocal." See also *Jordan v. Warren Ins. Co.* 1 Story, 342, 354, per *Story, J.*; *McGaw v. Ocean Ins. Co.* 23 Pick. 405, 411, per *Shaw, C. J.*; *Shipton v. Thornton*, 9 A. & E. 314, per *Ld. Denman, C. J.*; *Gibbs v. Grey*, 2 H. & N. 22, 40 Eng. L. & Eq. 531. In these cases the point did not arise, and the remarks are merely incidental, and are not therefore of so much authority as they would otherwise be. In the *Laws of Oleron*, art. 4, it is stated that if the ship becomes disabled, the shippers may have the goods by paying a *pro rata* freight, *if the master pleases*. The article then says: "But if the master will, he may repair his ship, if he can do it speedily; and if not, he may hire another ship to complete the voyage." The 16th article of the *Laws of Wisbuy*, also, provides that "the merchants may take away their goods, paying the freight, *or satisfying the master*." The *Ordonnance de la Marine*, liv. III. tit. III. du Fret, art. 11, provides merely that "if the master is obliged to repair his vessel during the voyage the shipper must wait, or pay the entire freight." It will thus be seen that by the early maritime laws, the consent of the master was requisite to a dissolution of the contract. The contract of affreightment is like any other contract, and cannot be dissolved at the will of one of the parties to it. It is that the goods shall be carried on the particular voyage for the agreed sum to be paid. If then, the master, for any reason, wishes to carry the goods on to the end of the voyage, it is difficult to see upon what principle of law he can be compelled to give them up. In *Tindal v. Taylor*, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210 (previously cited on p. 179, n. 1), the question arose, whether a shipper had a right to demand his goods after they were laden on board, but before the vessel sailed from her original port. The court held that, by the usage of trade, the merchant, if he demanded the goods in a reasonable time before the ship sailed, was entitled to have them delivered back to him on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them, but that these were conditions precedent, and if not performed, the original contract remained in force. The language of the court, however, shows that if this usage had not been proved, the shipper could not have demanded his

the necessary care of the cargo, will cost much time and money. Still, the master or owner may say that he shall perform and finish the passage as soon as possible, and thereby earn all his freight.<sup>1</sup> If a vessel with a perishable cargo on board is forced to put into a port of distress for repairs, and the goods are injured by the delay, the vessel and its owners are not liable unless the master can be shown to be in fault. He is bound to do the best he can to preserve the cargo, and if he does this, and is unable to send the cargo on in another vessel, the owners are not liable, and they are entitled to freight on all that is finally brought on.<sup>2</sup>

Nor is this all; for he may send the cargo forward in another ship, or even by land conveyance, to its destination, and then claim

goods, without the consent of the master, for they said: "The general rule is that a contract, once made, cannot be dissolved except with the consent of the contracting parties." And in *Clark v. Mass. Ins. Co.* 2 Pick. 104, Mr. Justice Putnam said: "Neither party is at liberty to abandon the contract without the consent of the other, or without legal cause, which was not procured or occasioned by the fault of the party who relies upon it." And in *The Nathaniel Hooper*, 3 Sumner, 542, 559, Mr. Justice Story said: "Suppose a ship meets with a calamity in the course of a voyage, and is compelled to put into a port to repair, and there the cargo is required to be unlivered, in order to make the repairs, or to insure its safety, or ascertain and repair the damage done to it; would such an unlivery dissolve the contract for the voyage? Certainly not." The Spanish Commercial Code of 1829 provides that the shipper may unload his goods on paying half freight, the expense of loading and unloading, and all damage to the other shippers. The latter to be at liberty to oppose the unloading, taking the goods upon themselves, and paying the invoice price. *Código de Comercio*, art. 765.

<sup>1</sup> In *Jordan v. Warren Ins. Co.* 1 Story, 342, insurance was effected on freight from New Orleans to Havre. Soon after sailing, the vessel met with a disaster, and was obliged to put back to New Orleans. The cargo was found to be so much damaged that it would have taken several months to have put it in a condition for reshipment, and it was sold by consent. Mr. Justice Story held, that the master had a right to wait till the goods were prepared for reshipment, and then to take them on to their port of destination, if they would arrive there in specie, and that not having done so, the underwriters were not liable. See also *Herbert v. Hallett*, 3 Johns. Cas. 93; *Griswold v. N. Y. Ins. Co.* 1 Johns. 205; *Saltus v. Ocean Ins. Co.* 14 Johns. 138; *Ellis v. Willard*, 5 Seld. 529; *Clark v. Mass. Ins. Co.* 2 Pick. 104; *McGaw v. Ocean Ins. Co.* 23 Pick. 405; *The Nathaniel Hooper*, 3 Sumner, 542; *Lord v. Neptune Ins. Co.* 10 Gray, 109; *Mordy v. Jones*, 4 B. & C. 394; *Hunter v. Prinsep*, 10 East, 378, 394; *Tronson v. Dent*, 8 Moore, P. C. 419, 36 Eng. L. & Eq. 41; *Tio v. Vance*, 11 La. 199; *Adams v. Haught*, 14 Texas, 243.

<sup>2</sup> *The Brig Collenberg*, 1 Black, 170.



his whole freight.<sup>1</sup> And he not only may do so, but, according to strong authorities, is bound thus to transship the cargo, if there be a vessel or other means of transport, to the place whither the cargo should go, within reasonable reach.<sup>2</sup> He is not bound to transship at all events;<sup>3</sup> but this obligation does not cease although there

<sup>1</sup> *Luke v. Lyde*, 2 Burr. 882, 889. See also cases in note *infra*. It is evident from the language of the court in the case of *Rosetto v. Gurney*, 11 C. B. 176, 183, 7 Eng. L. & Eq. 461, that if the master sends the goods on, he does it on the original contract, and is entitled to the freight stipulated for, although the expense of sending it on be less than by the original ship. And it was so determined in *Shipton v. Thornton*, 9 A. & E. 314.

<sup>2</sup> All the authorities agree that the master has the power to send the goods on in any other ship, if his own be lost, but it has been doubted whether it is his duty so to do. The question turns upon the nature of the contract made by the parties. It is admitted that the master is bound to take the goods on, if he can, in his own ship; but it has been argued that this is all, and that if his own ship is destroyed by the *vis major*, the contract is thereby put an end to. The Rhodian Law (Dig. 14. 2. 10. 1.), the Laws of Oleron, art. 4, and the Laws of Wisbuy, art. 16, gave the master power to transship in such a case. Faber (Com. ad Pand.) and Vinnius (notæ ad Com. Peckii, ad Rem Nauticam, 294, 295) were of opinion that the master was not bound to transship. The Ordonnance de la Marine, on the other hand, held it to be the duty of the master to send the goods on if he could. Tit. du Fret, art. 11. Valin (tit. du Fret, art. 11), and Pothier (Charte-Partie, n. 68), hold, that the master is not obliged, and that he loses only his freight for the entire voyage by his omission to procure another vessel. Emerigon maintains the opposite, in support of the old code, tom. 1, 428, 429. By the new code, the master is obliged, if the vessel becomes disabled, to repair her, and during the time of such repairing the shipper is bound to wait, or pay the full freight, and if the vessel cannot be repaired he must hire another, but if he cannot, *pro rata* freight is due. Code de Commerce, art. 296. The subject is also elaborately discussed by Boulay Paty, Cours de Droit Commercial Maritime, tom. ii. 398-405; and the views taken by Emerigon are adopted by him. Pardessus also is of the opinion that it is the duty of the master in such a case to procure another vessel. Cours de Droit Com., tom. iii. n. 644. In England, the point has not as yet been decided. See *Shipton v. Thornton*, 9 A. & E. 314; *Rosetto v. Gurney*, 11 C. B. 176, 188, 7 Eng. L. & Eq. 461. In this country the rule seems to be well settled in accordance with the doctrine of the text. *Saltus v. Ocean Ins. Co.* 12 Johns. 107; *Schieffelin v. N. Y. Ins. Co.* 9 Johns. 21; *Searle v. Scovell*, 4 Johns. Ch. 218, 222; *Treadwell v. Union Ins. Co.* 6 Cow. 270; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 130; *Hugg v. Augusta Ins. Co.* 7 How. 595, 609; *Adams v. Haight*, 14 Texas, 243. See *Thwing v. Washington Ins. Co.* 10 Gray, 443; *Lemont v. Lord*, 52 Maine, 365.

<sup>3</sup> *Whitney v. New York Ins. Co.* 18 Johns. 208. In *Hugg v. Augusta Ins. Co.* 7 How. 595, 609, the court said: "It is obvious, therefore, that the perishable condition of the article must be taken into consideration in deciding upon the

be no ship lying by him suitable for the purpose ; for he must use reasonable efforts to obtain one.<sup>1</sup> If he sends the goods on, he should take a bill of lading making them deliverable to the original consignees ;<sup>2</sup> and he may pay the expense of sending them on, and charge his whole freight to the shipper or consignee ; or he may, as we conceive, charge the consignee up to the port whence he transships the goods, and charge him also with the expense of transshipment. The rule, as usually expressed, is, that the master

obligation of the master, in the emergency, to repair his vessel, or to procure another for the purpose of sending it on to the port of delivery. If it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would, in all probability, occasion a destruction of the article in specie before it could arrive at the port of destination, or from its damaged condition, could not be reshipped in time consistently with the health of the crew, or safety of the vessel, or would not be in a fit condition from pestilential effluvia, or otherwise, to be carried on, it then was the duty of the master to sell the goods for the benefit of whom it might concern." See also *Williams v. Kennebec Ins. Co.* 31 Maine, 455 ; *Ogden v. Gen. Mut. Ins. Co.* 2 Duer, 204, 219 ; *Smith v. Martin*, 6 Binn. 262 ; *Pope v. Nickerson*, 3 Story, 465 ; *Jordan v. Warren Ins. Co.* 1 Story, 342 ; *Roux v. Salvador*, 3 Bing. N. C. 266 ; *Vlierboom v. Chapman*, 13 M. & W. 230.

<sup>1</sup> In *Saltus v. Ocean Ins. Co.* 12 Johns. 107, a vessel could have been procured at Cork, sixteen miles distant from the port of disaster, but the court held that the master was not bound to obtain one from there, but was only bound to seek for one in the port of distress, or in a port immediately contiguous. In *Treadwell v. Union Ins. Co.* 6 Cow. 270, the court said : "Some certain rule, to govern the discretion of the master, is desirable, wherever practicable. Although no general rule will govern every case, the approach to certainty will be considered beneficial to all parties. I think, then, the rule laid down in the last case is at once safe and reasonable. If there be a vessel in the same port, or a contiguous port, which is substantially the same thing, his duty is clear. The rule is imperative. But where resort must be had to distant places, and, independent of procuring a vessel, there are further serious impediments in the way of putting the cargo on board, the rule is not obligatory." See also *Hugg v. Augusta Ins. Co.* 7 How. 595, 610 ; *Whitney v. New York Ins. Co.* 18 Johns. 208. In *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131, the vessel was stranded at the Washwoods, on the coast of Virginia. The goods might have been taken to Norfolk, which was distant forty miles, by land, and there reshipped, and the court held that if it were reasonable to require the master to procure a vessel from there, taking into view the nature of the voyage, and the time, expense, and risk of the transportation to the port of destination, he would be bound to do so. They said : "It may happen that a vessel might be procured at a port in another State, and not geographically contiguous to the port of distress, in convenient time and upon more reasonable terms, than could be had in the port of distress."

<sup>2</sup> *Everett v. Saltus*, 15 Wend. 474, s. c. *nom. Saltus v. Everett*, 20 Wend. 267.

must transship if he can, and may then charge the *excess* of the cost of transshipment over his freight to the owner of the goods.<sup>1</sup> The reason of this is, that as soon as such an exigency arises the master is clothed, from necessity, with authority to act as agent of all interested. For the ship-owner, he must do what can be done to save his freight; for the shipper, he must do what can be done to save his goods and send them to their port of destination.

It may still be asked in any particular case, In what capacity does the master transship the cargo? as agent for his owners, or for the owners of the cargo. It has recently been declared by the Supreme Court of Massachusetts, that, after the owners have no longer any pecuniary interest in the ship or in the freight, because nothing of either can be saved or protected by any act of the master, he is no longer their agent, in the sense of having any authority to bind them.<sup>2</sup> This would be the case as to the freight, when he could transship and forward this only at a price which would leave nothing whatever to come to the owners of the ship. This view has been adopted and applied in a case of much interest

<sup>1</sup> In *Rosetto v. Gurney*, 11 C. B. 176, 188, 7 Eng. L. & Eq. 461, *Jervis*, C. J., referring to a case where the cargo was detained by perils of the sea at an intermediate port, said: "If the voyage is completed in the original ship, it is completed upon the original contract, and no additional freight is incurred. If the master transships, because the original ship is irreparably damaged, without considering whether he is bound to transship, or merely at liberty to do so, it is clear that he transships to earn his full freight, and so the delivery takes place upon the original contract. It may happen that a new bottom can only be obtained at a freight higher than the original rate of freight. It does not seem to have been settled, whether, in that case, the ship-owner may charge the cargo with the additional freight. By the French law he may do so, and as a consequence of that rule the increased freight would be an average loss to be added to the other items. See *Shipton v. Thornton*, 9 A. & E. 314." In *Hugg v. Augusta Ins. & Banking Co.* 7 How. 595, 609, the court said: "The owner of the cargo is liable for any increased freight arising from the hire of another vessel, and unless it can be procured at an expense not exceeding the amount of the freight to be earned by completing the voyage, the underwriter on freight has no right to insist upon this duty of the master. Beyond this it becomes a question between him and the owner or underwriter of the cargo." See also *Searle v. Scovell*, 4 Johns. Ch. 218; *Am. Ins. Co. v. Center*, 4 Wend. 45; *Mumford v. Comm. Ins. Co.* 5 Johns. 262; *Thwing v. Washington Ins. Co.* 10 Gray, 443; *Lemont v. Lord*, 52 Maine, 365. A question has been made how far an insurer on the cargo is liable for this advance freight. *Shultz v. Ohio Ins. Co.* 1 B. Mon. 339.

<sup>2</sup> *Thwing v. Washington Ins. Co.* 10 Gray, 443.

in Maine. The master of a disabled ship, condemned at an intermediate port, forwarded the cargo, engaging to pay a freight which was higher than the original freight for the whole voyage, these being the best terms he could get. When the cargo arrived, the consignees refused to receive it, and the master of the second vessel sold it; and as it brought less than the freight he was to receive, his owners brought an action against the owners of the first vessel for the balance. But the court held that their master had no right to act as their agent, and bind them to any contract from which it was not possible for them to gain any profit.<sup>1</sup>

He is the agent of both parties. And while he thus preserves his owner's right to freight, he lays upon the owner of the goods an obligation which is the same thing in fact, whether we say that the consignee must pay the whole freight *and* the excess of the cost of transshipment over what would have been the proportion of the freight earned by carriage on the original ship from the intermediate port, *or* the freight to that port, and the whole cost of transshipment.<sup>2</sup> And on a river a usage may be shown to charge

<sup>1</sup> *Lemont v. Lord*, 52 Me. 365.

<sup>2</sup> In *Shipton v. Thornton*, 9 A. & E. 814, Lord Denman, C. J., said: "No case of the sort that we are aware of has occurred in this country; nor is it necessary for us to express any opinion further than as it bears on the present question. It may well be that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighter; and that where the freight cannot be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant. For it must never be forgotten that the master acts in a double capacity, as agent of the owner as to the ship and freight, and agent of the merchant as to the goods; these interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and, therefore, the owner's *right* to tranship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and if so, it will be the duty of the master, as his agent, to do so. *In such a case*, the freighter will be bound by the act of his agent, and of course be liable for the increased freight." See also the remarks of Mr. Justice Story, in *Jordan v. Warren Ins. Co.* 1 Story, 342, 352, 353. In *Gibbs v. Grey*, 2 H. & N. 22, 40 Eng. L. & Eq. 581, the vessel chartered by the plaintiffs, and loaded with guano consigned to them, put into Valparaiso in distress, and it became necessary to tranship and forward the cargo. The captain who was appointed by the owners of the vessel, accordingly entered into a charter-party with the

lighterage in addition to freight, when the water is so low that the boat cannot proceed.<sup>1</sup>

If the master can transship and will not, then the shipper is entitled to his goods without making any payment of freight; for the master or ship-owner has no interest in, or lien on the goods whatever, except he has earned his freight, or is about to earn it. And if neither of these things is true, the shipper is entitled to his goods without any burden or charge upon them.<sup>2</sup>

Sometimes the ship-owner reserves the right to reship the goods, or send them to their destined port in another vessel; the bills of lading containing a provision, that the ship-owner "may send them forward in any other good vessel," or some equivalent phrase. In such case it seems that the ship-owner must still carry them himself if he can, and is under a responsibility for their safe delivery.<sup>3</sup>

defendants, the owners of another vessel, to take the guano on at a stipulated rate of freight. The charter-party stated the number of tons to be 470. The guano was put on board the latter ship, but it appeared that the quantity was much less than 470 tons. The plaintiffs had agents at Valparaiso, but they were not consulted. The plaintiffs, on the arrival of the vessel, agreed to pay the rate of freight in the charter-party on the number of tons actually delivered, but the defendants demanded freight on the number mentioned in the charter-party. This was finally paid under protest, and this action brought to recover it back. The court intimated a very strong doubt whether the master of a ship has any authority to send goods on without giving the agent of the owner any option to receive them, when the agent is known to be at the place. It was held that the master had no authority to bind the plaintiffs to pay dead freight for goods not actually transhipped, and that he could not bind the owners of the goods by a charter-party to provide a full cargo.

<sup>1</sup> *Andrews v. Roach*, 3 Ala. 590.

<sup>2</sup> In *Hunter v. Prinsep*, 10 East, 378, 394, Lord *Ellenborough* said: "If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject." See also *Portland Bank v. Stubbs*, 6 Mass. 422; *Adams v. Haught*, 14 Texas, 243. In *Welch v. Hicks*, 6 Cow. 504, the court held that it was a question for the jury to decide, whether the master intended *bona fide* to repair the vessel and complete the voyage, and whether the acceptance of the goods was voluntary on the part of the defendant, the shipper. For, if not, the court held that the ship-owner would not be entitled to any freight. See *Armroyd v. Union Ins. Co.* 3 Binn. 437.

<sup>3</sup> In *Dunseth v. Wade*, 2 Scam. 285, goods were shipped at Cincinnati to be transported to Peoria under the usual bill of lading, which contained the clause,

As such words do not lessen, neither do they enlarge the master's duty, but they are construed as giving him a certain privilege, which he is not bound to exercise.<sup>1</sup>

## SECTION VII.

## FREIGHT PRO RATA.

Instead of transshipping, the master may tender the goods at the intermediate port to the shipper, and the shipper may refuse to accept, and then the master must transship if he can; or the shipper may accept the goods at that place, and then he must pay freight *pro rata itineris*; that is, must pay such part or proportion of the whole freight as the part of the voyage performed is of the whole voyage.<sup>2</sup>

"with privilege of reshipping on any good boat." Held, that the master was bound to deliver the goods at Peoria, unless their delivery was prevented by unavoidable accidents of the river. The court said: "What change in the terms of the contract did the words, 'with privilege of reshipping on any good boat,' written in the margin of the bill of lading, produce? Was the master discharged from all obligation in relation to the carriage and delivery of the goods at Peoria, by merely reshipping the goods on board 'any good boat'? Clearly not. He was to receive freight on the delivery of the goods at Peoria, for transporting the goods the whole distance. His obligations were consequently coextensive with the reward he was to receive." It was so held also in *McGregor v. Kilgore*, 6 Ohio, 358; *Whitesides v. Russell*, 8 Watts & S. 44. See also *Broadwell v. Butler*, 6 McLean, C. C. 296; *Wilcox v. Parmelee*, 3 Sandf. 610; *Dalzell v. Steamer Saxon*, 10 La. Ann. 280.

<sup>1</sup> In *Sturgess v. Steamboat Columbus*, 23 Mo. 230, where the bill of lading contained this provision, it was held, that the master was not bound to reship on account of low water.

<sup>2</sup> The contract of affreightment, as we have seen, being entire, the ship-owner will not be entitled to recover on the contract unless it be completely performed. *Sturgis v. Gairdner*, 2 Brev. 233. But like any other contract this may be terminated by the consent of the parties to it. And if the contract is put an end to, and the shipper voluntarily receives his goods, the shipper has, from the earliest times, been held liable to pay a ratable freight. *Roccus*, note 81; *Laws of Oleron*, art. 10; *Ordinance of Wisbuy*, art. 16, 37; *Consolato del Mare*, and *The Rhodian Laws* as cited by Lord *Mansfield*, in *Luke v. Lyde*, 2 Burr. 882, 889; *Maylne*, *Lex Mercatoria*, p. 98; *Lutwidge v. Grey*, cited in *Luke v. Lyde*, and at length in *Abbott on Shipping*, 438; *Luke v. Lyde*, 2 Burr. 882. See also *Parsons v. Hardy*, 14 Wend. 215; *Rossiter v. Chester*, 1 Doug. Mich. 154; *Hunt v. Haskell*, 24 Maine, 339; *Forbes v. Rice*, 2 Brev. 363.

Many questions have been raised respecting this *pro rata* payment of freight, and some of them are not yet finally settled.

The principal question is, what acceptance on the part of the shipper lays upon him the obligation of this payment. Formerly, it was held, that any acceptance was sufficient to have this effect; now it seems to be the law that the acceptance must be voluntary. Questions of this kind are often complicated with the particular facts of the case, and it is therefore difficult to lay down any abstract rule which will serve to decide and determine all cases. If the earliest leading case be law,<sup>1</sup> then if a ship is captured and recaptured and brought into any port nearer to her destination than the port from which she sailed, and there the shipper takes his goods, he must pay freight *pro rata*, whatever may have been the motive from which, or the compulsion under which, he took them. But this rule, which has been qualified in England, has been, if not positively set aside, modified in a yet greater degree in this country. Here, it now seems to be held, that the acceptance must be voluntary in substance and fact, or no claim for freight arises from it.<sup>2</sup> According to the earlier view, if the goods arrived

<sup>1</sup> *Luke v. Lyde*, 2 Burr. 882.

<sup>2</sup> The difficulty in regard to the law on this point has arisen from losing sight of the nature of the contract. The master is entitled to take the goods on to the port of destination, and thus earn his freight, and the shipper has a right to say that this shall be done. If, therefore, the goods are given up to the shipper at the intermediate port, it must be by virtue of a new contract made by the parties. And as the shipper has a right to have the goods taken on, he cannot, against his consent, be compelled to receive them at the intermediate port. The case of *Luke v. Lyde* has been generally considered as warranting the broad position that the shipper is bound to pay a *pro rata* freight if he receives the goods at any place short of the port of destination, whether such reception be voluntary or not. And in some early cases in this country it seems to have been thus understood. *United Ins. Co. v. Lenox*, 1 Johns. Cas. 377; *Williams v. Smith*, 2 Caines, 13; *Robinson v. Mar. Ins. Co.* 2 Johns. 323. See also *Post v. Robertson*, 1 Johns. 24; *Baillie v. Moudigliani*, Park on Ins. 70. Whether the case of *Luke v. Lyde* justified such a construction is, at least, doubtful; but, however this may be, the law is now well settled that the acceptance must be voluntary. See *Liddard v. Lopes*, 10 East, 526; *Cook v. Jennings*, 7 T. R. 381; *Mulloy v. Backer*, 5 East, 316; *Vlierboom v. Chapman*, 13 M. & W. 230; *Mar. Ins. Co. v. United Ins. Co.* 9 Johns. 186; *Welch v. Hicks*, 6 Cow. 504; *Center v. Am. Ins. Co.* 7 Cow. 564, 582; *Armroyd v. Union Ins. Co.* 3 Binn. 437; *Hurtin v. Union Ins. Co.* 1 Wash. C. C. 530; *Calender v. Ins. Co. of N. A.* 5 Binn. 525; *Gray v. Waln*, 2 S. & R. 229; *Caze v. Balt. Ins. Co.* 7 Cranch, 358; *Sampayo v. Salter*, 1 Mason, 43; *Col. Ins. Co. v.*

at the intermediate port, the owner of them must either take and pay freight, or refuse to take at all. Now, if the possession of the goods is in fact forced upon him, if there seems to be no alternative, and he takes under what may be regarded as a strict compulsion, or if the goods or their proceeds are thrown upon him without his action, he thereby incurs no obligation to pay any freight.<sup>1</sup>

However reasonable this rule may be in theory, it must very often be of difficult application. The equity, in all these cases, would seem to be this: if the owner of the goods receives them at any intermediate port, with their value increased by the carriage of them to that port, he should pay the ship-owner for this increase of value. But if he sends them to one place, and receives them at another because he cannot well help himself, and they are worth

Catlett, 12 Wheat. 383; Hooe v. Mason, 1 Wash. Va. 207; Rossiter v. Chester, 1 Doug. Mich. 154; Adams v. Haught, 14 Texas, 243; The Nathaniel Hooper, 3 Sumner, 542. See also Pinto v. Atwater, 1 Day, 193; Dorr v. N. E. Mar. Ins. Co. 4 Mass. 221; Coffin v. Storer, 5 Mass. 252.

<sup>1</sup> It was held, in Welch v. Hicks, 6 Cow. 504, that when a master refuses to repair his ship, and send on the goods, or to provide other vessels for this purpose, and the owner of the goods then receives them, this will not be a voluntary acceptance. So, too, where a vessel had been captured, and all the goods condemned, excepting those of the plaintiff, which were sold by the defendant, who claimed a right to deduct from the proceeds the stipulated freight for the whole voyage, or at least a *pro rata* freight, the court held that none was due. Sompayo v. Salter, 1 Mason, 43. Mr. Justice Story said: "But it never has been supposed that a *pro rata* freight was due, when by a capture the party has been incapable of performing the voyage, and the shipper has been compelled to receive his goods at the hands of the Admiralty." See also Mar. Ins. Co. v. United Ins. Co. 9 Johns. 186. In Armroyd v. Union Ins. Co. 3 Binn. 437, the vessel was condemned, sold, and the voyage broken up. The goods also were sold, and the net proceeds paid to the supercargo. Held no freight was due. In Hurtin v. Union Ins. Co. 1 Wash. C. C. 530, where the vessel was captured, but not condemned, and the supercargo thought it was for the best interest of all concerned that the goods should be sold, Mr. Justice Washington said: "But if it is received by compulsion, and the supercargo or captain is acting for the best, for the benefit of all concerned, with a view to preserve it for the person entitled to receive the proceeds, no freight is earned." See also Callender v. Ins. Co. of N. A. 5 Binn. 525; Gray v. Waln, 2 S. & R. 229; Caze v. Balt. Ins. Co. 7 Cranch, 358; Pinto v. Atwater, 1 Day, 193; Halwerson v. Cole, 1 Speers, 321. In The Nathaniel Hooper, 3 Sumn. 542, 566, Mr. Justice Story held an acceptance to be voluntary which, he says, "is, if I may so say, a reluctant acquiescence forced upon them by an overruling necessity." See also Richardson v. Young, 38 Penn. State, 169; Rogers v. West, 9 Ind. 400.



to him no more at this port than at the port from which they sailed, then nothing is due from him to the ship-owner. This we say is the equity of the case, and it is, we think, the tendency of the modern adjudications of this question to apply to each case a rule which will work out this equity.<sup>1</sup>

The master is not authorized to accept the cargo at an intermediate port, so as to charge the owner with a *pro rata* freight.<sup>2</sup> And if he sells the cargo and the shipper lays claim to the proceeds, this does not amount to a voluntary acceptance on his part.<sup>3</sup> If the shipper abandons the goods to the underwriter after the voyage is broken up, it has been held that a *pro rata* freight is due.<sup>4</sup> This, however, must depend upon whether the owners of the vessel are ready and willing to send the goods on;<sup>5</sup> for if the owners of the vessel take no steps to forward the goods, freight *pro rata* is not due.<sup>6</sup>

It is obvious that no freight *pro rata* can be recovered on the original contract. A claim for it can be sustained only on the ground of an implied assumpsit;<sup>7</sup> and this again would seem

<sup>1</sup> *Coffin v. Storer*, 5 Mass. 252. In accordance with this rule it has been decided that, where a vessel receives damage, and puts back to the port from which she started, and the master chooses to deliver up the goods when he is not obliged to, no freight will be due, because no beneficial service has been rendered by the ship-owners. *Scott v. Libby*, 2 Johns. 336; *Miston v. Lord*, 1 Blatchf. C. C. 354; *Lord v. Neptune Ins. Co.* 10 Gray, 109. See also *Jordan v. Warren Ins. Co.* 1 Story, 342. In the case of *The Hiram*, 3 Rob. Adm. 180, the vessel sailed on a voyage from Liverpool to Halifax. She was captured and brought back to Plymouth. Sir *William Scott* held that was the same as if she had been brought to Liverpool, for the shipper had derived no benefit from the voyage. He therefore held that no freight whatever was due.

<sup>2</sup> *Vlierboom v. Chapman*, 13 M. & W. 230; *The Ann D. Richardson*, Abbott, Adm. 499, 1 Blatchf. C. C. 358; *Miston v. Lord*, 1 Blatchf. C. C. 354; *The Brig Velona*, U. S. D. C. Mass., *Ware, J.*, Boston Courier, Dec. 15, 1857.

<sup>3</sup> See p. 241, n. 1, and cases in note *supra*.

<sup>4</sup> *Van Norden v. Littlejohn*, 2 Taylor, 16.

<sup>5</sup> *Smyth v. Wright*, 15 Barb. 51.

<sup>6</sup> *Atlantic Ins. Co. v. Bird*, 2 Bosw. 195.

<sup>7</sup> The action in *Luke v. Lyde*, 2 Burr. 882, although it is not so stated in the report of the case, was assumpsit, and not an action on the original contract. See *Cook v. Jennings*, 7 T. R. 381. Abbott also, in his *Treatise on Shipping*, p. 444, says that he had examined the record, and found that the declaration was for the freight of goods carried in the plaintiff's ship, without mentioning from or to what place. See also *Christy v. Row*, 1 Taunt. 300; *Mulloy v. Backer*, 5 East, 316; *Liddard v. Lopes*, 10 East, 526; *Vlierboom v. Chapman*, 13 M. & W. 230; *Rob-*

to have no other foundation than the general rule, that one who accepts and holds a benefit rendered, must acknowledge himself indebted for it. In like manner, if a ship is chartered to carry a cargo on a certain voyage, and a part of the cargo is lost by the perils of the sea, and a part is carried and delivered and accepted, although there may be no recovery of any part of the charter-money in an action on the charter-party itself, yet an action may be maintained on the implied assumpsit for freight for the goods carried and received.<sup>1</sup>

It is not quite certain how the proportion shall be calculated, when *pro rata* freight is due. There are in fact but two ways of doing this. The part of the voyage for which freight is to be paid may be a geographical part, or a commercial (meaning a *pecuniary*), part. That is, the shipper may be held to pay, as in the earlier cases, so much per mile or league, for what has been done out of the whole voyage, or else so much as it would cost to bring them to the port at which the goods are accepted. Every rule must be a modification of one of these. The latter rule is that which we think is favored, and will generally be adopted in this country; and the simplest method of applying it would be for the shipper to pay the whole freight, deducting what would be the ordinary or usual cost of carrying the cargo from the port at which he received it to that of its original destination.<sup>2</sup>

*inson v. Mar. Ins. Co.* 2 Johns. 323; *Mar. Ins. Co. v. United Ins. Co.* 9 Johns. 186; *Armroyd v. Union Ins. Co.* 3 Binn. 437, 447; *Callender v. Ins. Co. of N. A.* 5 Binn. 525; *Caze v. Balt. Ins. Co.* 7 Cranch, 358; *The Nathaniel Hooper*, 3 Sumner, 542; *Hurtin v. Union Ins. Co.* 1 Wash. C. C. 530. See also cases *ante*, p. 240, note 2.

<sup>1</sup> *Post v. Robertson*, 1 Johns. 24; *Coffin v. Storer*, 5 Mass. 252. If a charter-party is entered into for a time certain, at a given rate per month, and in the same proportion for whatever time the vessel may be employed, and is afterwards dissolved by mutual consent, *pro rata* compensation can be recovered under a special count alleging the employment of the vessel from the time stipulated for the charter-party to commence till its dissolution, or it may be recovered under a general count of *indebitatus assumpsit*. *Wheeler v. Curtis*, 11 Wend. 653. And an action of covenant can be maintained in a case where a vessel is let to perform several voyages, and performs an intermediate voyage at the request of the charterer's agent, the voyages described in the charter-party having been performed, and the charterer in the action of covenant seeking to recover no recompense for the additional voyage. *Solomon v. Higgins*, 6 Wend. 425. See also *The Soblomsten*, Law Rep. 1 Adm. 293.

<sup>2</sup> In *Luke v. Lyde*, 2 Burr. 882, 888, Lord Mansfield said: "Here the master

The questions relating to *pro rata* freight have often arisen in cases of capture and recapture, or release and return of the ship; or condemnation and sale of the ship and cargo and an ultimate recovery of the proceeds; or sale under decree for salvage, and payment of proceeds to the shipper or his representatives, after deducting salvage. We do not consider these cases by themselves, for the general rules and principles we have already stated are perfectly applicable to them. Where goods never arrive at their port of destination, but are captured and retaken, or restored, or sold by decree and the proceeds paid over, at some other port or place, such reception of the cargo or its proceeds would not now be considered a voluntary acceptance, so as to raise the assumption on which the implied promise to pay *pro rata* freight must rest, unless there were peculiar facts or stipulations to sustain such an implication.<sup>1</sup> It should be added, that if the parties, in the original contract, whether by bill of lading or otherwise, choose to stipulate — as they sometimes do — that no claim shall arise under any circumstances for *pro rata* freight, no such claim will be given by any implication of law.

had come seventeen days of his voyage, and was within four days of the destined port when the accident happened. Therefore he ought to be paid his freight for 17-21st parts of the full voyage." In *Robinson v. Mar. Ins. Co.* 2 Johns. 323, owing to the circumstances of the case, the rule of *Luke v. Lyde* was adopted. *Kent*, C. J., however, in delivering the opinion of the court, considered the rule laid down in *Marine Ins. Co. v. Lenox*, decided by the court for the correction of errors in New York, to be more equitable when it could be applied. That rule was to ascertain how much of the voyage had been performed, not when the ship first encountered the peril, and was interrupted in her course, but when the goods had arrived at the intermediate port, because *that* was the extent of the voyage performed, as far as regarded the interest of the shipper. In *Coffin v. Storer*, 5 Mass. 252, it was held that freight was not to be calculated according to the portion of the voyage performed, compared with that of the whole voyage, but the actual benefit which the shipper received by the transportation.

<sup>1</sup> *Escopiniche v. Stewart*, 2 Conn. 391. In this case rice was shipped to Bermuda. On the way the vessel was captured and taken to Antigua, but the captain of the privateer, on finding that it belonged to the defendant, delivered it up to a passenger on board the vessel, who sold it, and sent the proceeds to the defendant. It was held that this did not amount to an acceptance so as to render the defendant liable for freight. See also cases cited *ante*, pp. 240, 241.

## SECTION VIII.

## OF SHIPS AS COMMON CARRIERS.

Ships are often called common carriers ; and that they may be so is certain ; but that all ships which carry goods are to be treated as common carriers, cannot be true ; and the language used in relation to this subject is either inaccurate and loose, or is misunderstood because it is not interpreted by a reference to the facts of the case in which it is used. Thus in a leading case on the law of carriers,<sup>1</sup> it is intimated that there is no case which makes any distinction between a land and a water carrier. But that case related to regular inland navigation. And in an American case,<sup>2</sup> the court say, that "a carrier by water, whether by inland navigation or coastwise from port to port, or to and from foreign countries, is a common carrier." But the court cannot mean that every carrier by water is a common carrier, for then there would be a very great difference between land and water carriers. The vessel in that case was a coasting vessel plying between Boston and Philadelphia ; and the court must have meant, such a carrier by water as they were then considering. The true rule undoubtedly is, that one who carries by water, in the same way and on the same terms as a common carrier by land, is also a common carrier ; or, in other words, it is not the land or the water which determines whether a carrier of goods is a common carrier, but other considerations, which are the same in both cases.

What, then, are these considerations ? We take a common carrier to be one who offers to carry goods for any person, between certain termini or on a certain route ; and he is bound to carry for all who tender to him goods and the price of carriage, and insures those goods against all loss but that arising from the act of God or the public enemy ; and has a lien on the goods for the price of carriage. These are essentials ; and though any or all of them may certainly be modified, and as we think may be controlled, by express agreement, yet if either of these elements is wanting from the relation of the parties, without any such agreement, then

<sup>1</sup> *Trent Navigation Co. v. Wood*, 3 Esp. 127.

<sup>2</sup> *Hastings v. Pepper*, 11 Pick. 41, 43.

we say the carrier is not a common carrier, either by land or by water.<sup>1</sup>

If we are right in this, no vessel would be a common carrier, that did not ply regularly, alone or in connection with others, on some definite route, or between two certain termini. No vessel is therefore a common carrier unless she be what is commonly called a packet, or sail in a packet line. All general ships would be excluded; and all vessels under steam or canvas, on lakes or rivers, which are like general ships; for they would be as a private or casual carrier by land, and would be no more a common carrier because on the water. Then, if we allowed another essential element, — the obligation to carry for all who offer, — to exist in the case of regular packets, which might be doubted, it can hardly be supposed that every owner of a vessel put up as a general ship, loses all right of refusal or choice of goods or shippers, unless the commodities offered are either dangerous or unusual. Coasting vessels,<sup>2</sup> steamboats,<sup>3</sup> canal boatmen and those on

<sup>1</sup> In *Boucher v. Lawson*, Cas. temp. Hardw. London ed. 85, 194, a suit was brought against the owner of a vessel for the loss of goods shipped by the plaintiff. Judgment was given for the defendant, on the ground that it was not found that the ship usually carried for hire, or that she was employed in this case to carry according to the custom.

<sup>2</sup> *Hastings v. Pepper*, 11 Pick. 41; *The Sch. Reeside*, 2 Sumner, 567; *Crosby v. Fitch*, 12 Conn. 410; *McClures v. Hammond*, 1 Bay, 99; *Williams v. Grant*, 1 Conn. 487; *The Sch. Emma Johnson*, 1 Sprague, 527. In *Oakey v. Russell*, 18 Mart. La. 58, goods were shipped from New York to New Orleans. It does not appear whether the vessel was a packet or not, or whether a bill of lading was given. The defendants were held liable as common carriers. *Parker v. Flagg*, 26 Maine, 181, is a similar case. It was admitted that the defendants were common carriers. The facts are not fully given in the report of the case. In the following cases it does not appear whether the vessel was a packet or not, but a bill of lading was given. *King v. Shepherd*, 3 Story, 349; *Watkinson v. Laughton*, 8 Johns. 213; *Ferguson v. Cappeau*, 6 Harris & J. 394.

<sup>3</sup> *The Huntress*, Daveis, 82; *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, 16; *Jencks v. Coleman*, 2 Sumner, 221; *Gilmore v. Carman*, 1 Smedes & M. 279; *McGregor v. Kilgore*, 6 Ohio, 358; *McArthur v. Sears*, 21 Wend. 190; *Dunseth v. Wade*, 2 Scam. 285; *Hart v. Allen*, 2 Watts, 114; *Pardee v. Drew*, 25 Wend. 459; *Allen v. Sewall*, 2 Wend. 327; *Sewall v. Allen*, 6 Wend. 335; *Harrington v. M'Shane*, 2 Watts, 443; *Porterfield v. Humphreys*, 8 Humph. 497; *Hale v. N. J. Steam Nav. Co.* 15 Conn. 539; *Singleton v. Hilliard*, 1 Strob. 203; *Orange Bank v. Brown*, 3 Wend. 158; *New Jersey Steam. Nav. Co. v. Merchants Bank*, 6 How. 344; *Bennett v. Filyaw*, 1 Fla. 403; *Charleston Steamboat Co. v. Bason*, Harper, 262; *Jones v. Pitcher*, 3 Stew. & P. 185; *Swindler v. Hilliard*, 2 Rich. 286; *Benett v. Peninsular Steamboat Co.* 6 C. B. 775.

rivers,<sup>1</sup> and ferrymen<sup>2</sup> are all common carriers if their general occupation is to carry for the public. Steam tow-boats are not generally considered common carriers, in respect to the boats they have in tow;<sup>3</sup> and a company maintaining a canal for the use of the

<sup>1</sup> *Hyde v. Trent Nav. Co.* 5 T. R. 389; *Trent Nav. Co. v. Wood*, 3 Esp. 127; *Elliott v. Rossell*, 10 Johns. 1; *Kemp v. Coughtry*, 11 Johns. 107; *Colt v. McMechen*, 6 Johns. 160; *Merahon v. Hobensack*, 2 Zab. 372; *Fuller v. Bradley*, 25 Penn. State, 120; *Spencer v. Daggett*, 2 Vt. 92; *Arnold v. Halenbake*, 5 Wend. 33; *De Mott v. Laraway*, 14 Wend. 225; *Parsons v. Hardy*, 14 Wend. 215; *Humphreys v. Reed*, 6 Whart. 435; *Bowman v. Teall*, 23 Wend. 306. In *Eveleigh v. Sylvester*, 2 Brev. 178, it was said that the doctrine of common carriers did not apply with full force to boats on the rivers, but this doctrine does not seem to have been followed. In *Lengsfeld v. Jones*, 11 La. Ann. 624, it was held that, under a bill of lading in the ordinary form, a flat-boat was liable as a common carrier. See also *Harrington v. Lyles*, 2 Nott & McC. 88; *Gordon v. Buchanan*, 5 Yerg. 71; *Turney v. Wilson*, 7 id. 340. In *Steele v. McTyer*, 31 Ala. 667, it was held that persons who build or procure a flat-boat, and who hold themselves out as ready to carry cotton for all persons, are common carriers, although they intend to break up the boat and sell it for lumber at the end of the voyage. In *Beckwith v. Frisbie*, 32 Vt. 559, the owners of a canal-boat were, under the circumstances of the case, held to be private carriers.

<sup>2</sup> In regard to ferrymen, it was held in *Walker v. Jackson*, 10 M. & W. 161, that they were not generally common carriers, though a usage might be shown to that effect. In this country, however, a ferryman is generally considered a common carrier. *Cook v. Gourdin*, 2 Nott & McC. 19; *Babcock v. Herbert*, 3 Ala. 392; *Smith v. Seward*, 3 Barr. 342; *Pomeroy v. Donaldson*, 5 Mo. 36; *Cohen v. Hume*, 1 McCord, 439; *Littlejohn v. Jones*, 2 McMullan, 365; *Rutherford v. McGowen*, 1 Nott & McC. 17; *Wilson v. Hamilton*, 4 Ohio State, 722; *Albright v. Penn*, 14 Texas, 290; *Fisher v. Clisbee*, 12 Ill. 344; *Powell v. Mills*, 37 Missis. 691; *Sanders v. Young*, 1 Head, 219; *Miller v. Pendleton*, 8 Gray, 547; *Claypool v. McAllister*, 20 Ill. 504; *Hall v. Renfro*, 3 Met. Ky. 61; *Whitmore v. Bowman*, 4 Greene, Iowa, 148; *May v. Hanson*, 5 Calif. 360.

<sup>3</sup> *Caton v. Rumney*, 13 Wend. 387; *Alexander v. Greene*, 3 Hill, 1. This case was reversed on appeal, 7 Hill, 533. In a subsequent case in the same State, the court of appeals pronounced the decision in 7 Hill, 533, not to be law. Mr. Justice *Bronson* said: "It is true that the judgment in *Alexander v. Greene* was reversed by the court of errors. But what particular point or principle of law was decided by the court, or what a majority of the members thought upon any particular question of law no one can tell." *Wells v. Steam Nav. Co.* 2 Comst. 204. See also *Penn. Nav. Co. v. Dandridge*, 8 Gill & J. 248; *Leonard v. Hendrickson*, 18 Penn. State, 40; *Abbey v. The R. L. Stevens*, U. S. D. C., N. Y., 21 Law Rep. 41. In Louisiana, it is held that tow-boats are common carriers. *Smith v. Pierce*, 1 La. 349; *Adams v. New Orleans Steamboat Co.* 11 La. 46. See also the opinion of Mr. Justice *Kane*, in *Vanderslice v. The Steam Tow-boat Superior*, 13 Law Rep. 399. The reasoning of the learned judge in this case

public, are not liable as common carriers, but are bound to take reasonable care that the canal may be safely navigated.<sup>1</sup> While we have no doubt that ocean packets are common carriers, we are of the opinion that a general ship is not a common carrier.<sup>2</sup>

is worthy of a careful examination, as it furnishes a very strong argument in favor of the doctrine of holding tow-boats liable as common carriers. When the case came before the circuit court, *Grier, J.*, said, that he could not assent to the doctrine that tow-boats were common carriers. See also *The Steamer New Philadelphia*, 1 Black, 62; *Merrick v. Brainard*, 38 Barb. 574; *White v. Steam Tug Mary Ann*, 6 Calif. 462; *Hays v. Paul*, 51 Penn. State, 134; *Walston v. Myers*, 5 Jones, 174; *Ashmore v. Penn. Steam T. Co.* 4 Dutch. 180. Where the tug and boats belonged to the same persons, and goods were shipped under a bill of lading, the owners of the tug were held liable as common carriers. *Sprowl v. Kellar*, 4 Stew. & P. 382.

<sup>1</sup> *Exchange Ins. Co. v. Delaware Canal Co.* 10 Bosw. 180.

<sup>2</sup> It seems to be taken for granted by the authorities that a general ship is a common carrier, and liable as such, whether a bill of lading is given or not. The precise question, however, has never been decided in any reported case, and we cannot but believe that, when it does arise, the *dicta* of the judges and text writers will be disregarded, and the subject receive that investigation which, from its importance, it deserves. It has been held, from the earliest times, that a common carrier by water has imposed on him the same liabilities as a common carrier by land, and that the master of a vessel can be sued as well as the owners, he being considered not merely a servant of the owners. *Mors v. Slue*, T. Raym. 220, Ventris, 238, 2 Lev. 69; *Rich v. Kneeland*, Cro. Jac. 330, Hob. 17; *Boson v. Sandford*, 2 Salk. 440, 1 Show. 29, 101, 3 Lev. 258, and Carth. 58; *Goff v. Clinkard*, cited in 1 Wilson, 282. Mr. Justice *Story*, in his treatise on Bailments, § 501, speaks of vessels employed in the coasting trade, or in foreign trade, for all persons offering goods for the port of destination, as general ships. The language of the court in *Allen v. Sewall*, 2 Wend. 327, and 6 Wend. 335, is even more loose than this. On p. 343, *Savage*, C. J., calls a steamboat plying regularly between New York and Albany, a general ship. Now, if such a vessel is a general ship, then a general ship is a common carrier; but a general ship is something very different from this, and from confounding the two the difficulty in a great measure has arisen. It cannot, however, be denied that there are *dicta* to be found which cannot thus be explained. Thus in *Laveroni v. Drury*, 8 Exch. 166, 170, 16 Eng. L. & Eq. 510, *Pollock*, C. B., said: "By the law of England the master and owner of a general ship are common carriers for hire, and responsible as such. This, according to the well-known rule, renders them liable for every damage which occurs during the voyage, except that caused by the act of God, or the Queen's enemies." He then says they may limit their liability by the bill of lading, which is then the evidence of the contract made between the parties. In *Clark v. Barnwell*, 12 How. 272, the vessel was a general ship; but a bill of lading was given. On p. 280, the court speak of the master and owners as common carriers. See also the remarks of Mr. Justice *Story* in *King v. Shepherd*, 3

The question, however, is of less practical importance, because, *Story*, 349; *Propeller Niagara v. Cordes*, 21 How. 7, and *Kemp v. Coughtry*, 11 Johns. 107. In *Gage v. Tirrell*, 9 Allen, 299, there was a written agreement and also a bill of lading. The agreement contained no exception of any risk. The bill of lading excepted perils of the seas. The court held the owners of the vessel to be common carriers, and that they were not liable for loss by public enemies. *Bigelow*, C. J., said: "In determining the question of the liability of the defendants in this action, it is important to bear in mind the precise nature of the relation which the contracts of affreightment created between the parties. The facts agreed leave no room for doubt on this point. It is not a case where a whole ship was chartered to certain persons for a voyage, or where goods were received for the plaintiffs only, the residue of the ship being used by the defendants for their own private purposes. But it appears that a part of the ship only was to be taken up by the cargo belonging to the plaintiffs, and that other persons were to ship merchandise on board, which was to be carried to and delivered at New Orleans. The ship was therefore a general ship; that is she was employed in the transportation of merchandise for persons generally. This fact is decisive of the character of the contract into which the parties entered, and of the nature of the liability which the defendants assumed under it. They were common carriers."

It is a well-settled principle that if a person on land makes a contract to carry goods, when it is not his usual custom so to do, he cannot be held as a common carrier. *Fish v. Chapman*, 2 Kelly, 349; *Samms v. Stewart*, 20 Ohio, 69. See also *Fuller v. Bradley*, 25 Penn. State, 120. Now if we apply the rule that there is no difference between carriers on land and carriers by water, a general ship cannot be considered as a common carrier, for "the contract for the conveyance of merchandise in a general ship," as defined by Lord *Tenterden* (*Abbott on Ship*, 319), "is that by which the master and owners of a ship destined on a particular voyage, engage separately with various merchants unconnected with each other, to convey their respective goods to the place of the ship's destination." In *Lane v. Cotton*, 12 Mod. 472, 484, it was said that many actions have been maintained against carriers for refusing to take goods, though the cases were not reported. See also *Jackson v. Rogers*, 2 Show. 327; *Riley v. Horne*, 5 Bing. 217; *Harris v. Packwood*, 3 Taunt. 264, 272, per *Lawrence*, J.; *Hollister v. Nowlen*, 19 Wend. 234, 239; *Edwards v. Sherratt*, 1 East, 604; *Batson v. Donovan*, 4 B. & Ald. 21, 32; *Elsee v. Gatward*, 5 T. R. 143; *Fish v. Chapman*, 2 Kelly, 349; *Jencks v. Coleman*, 2 Sumner, 221; *Dwight v. Brewster*, 1 Pick. 50; *Bennett v. Dutton*, 10 N. H. 481. And, as it is by no means unusual for the master or owner of a general ship to refuse to take the goods of all who offer, the question will probably come up in this way. Suppose, for instance, a merchant has a quantity of merchandise which he wishes to send to a foreign port; he therefore chartered a vessel, but having room to spare, puts up part of the vessel as a general ship. It would be for his interest that no goods of the same description as his should be taken in his vessel. If any were offered we think he clearly would not be bound to take them, and if not, he should not be considered a common carrier.



if general ships are common carriers, the modification of their liability by bills of lading is undoubtedly valid; and nearly all the carriage of goods by water is now regulated by bills of lading.<sup>1</sup>

<sup>1</sup> Thus in *Pope v. Nickerson*, 3 Story, 465, 473, Mr. Justice Story said: "Whether the schooner was a common carrier, that is, a general carrier vessel, whose mere employment was to take goods on board for hire for any persons whatever, or whether she was simply a carrier vessel employed on the present voyage *pro hac vice*, has been much discussed at the bar. But in my judgment, nothing does, in this case, turn upon any distinction between the cases; for, under the bills of lading, precisely the same obligations attach to the owners and the master in regard to the shippers, whether she was a general, or common carrier, or simply a carrier *pro hac vice*. The bills of lading ascertain and fix and control the liability, and the exceptions therein contained cover the usual risks not taken by the owners." See also *The Commander-in-chief*, 1 Wall. 43, 51. In *The Sch. Emma Johnson*, 1 Sprague, 527, the vessel was employed as a packet between Boston and Chatham, in Massachusetts. A receipt was given, stating the receipt of the goods marked, &c. It was contended that the undertaking was to be deemed the same as if a common bill of lading had been given, and for that case the court so considered it. The power of a carrier to limit or increase his liability by a special contract was early recognized in England. But that he could make such a contract by a general notice, brought home to the knowledge of the party, is a doctrine of much later origin. Mention is first made of it by Mr. Justice Burrough, in *Smith v. Horne*, 8 Taunt. 144. He says: "The doctrine of notice was never known until the case of *Forward v. Pittard*, 1 T. R. 27, which I argued many years ago." The case referred to was decided in 1785, and as reported does not mention the subject of notice. It was first held that he might thus limit his responsibility in *Nicholson v. Willan*, 5 East, 507. See also *Maving v. Todd*, 1 Stark. 72; *Leeson v. Holt*, 1 Stark. 186; *Evans v. Soule*, 2 M. & S. 1; *Ellis v. Turner*, 8 T. R. 531. This question has been put to rest in England by the Carrier's Act of 2 Geo. 4, & 1 Will. 4, c. 68. In this country the subject has been the theme of fruitful investigation and research. It has generally been held that such a notice is of no avail even though brought home to the knowledge of the party. *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, id. 251; *Camden & Amboy R. v. Belknap*, 21 Wend. 354; *Clark v. Faxton*, id. 153; *Dorr v. N. J. Steam Nav. Co.* 1 Kern. 485; *Farmers' Bank v. Champlain Transp. Co.* 23 Vt. 186; *Kimball v. Rutland R.* 26 Vt. 247; *Moses v. Boston & Maine R.* 4 Foster, 71; *Jones v. Voorhees*, 10 Ohio, 145; *Hale v. N. J. Steam Nav. Co.* 15 Conn. 539; *Logan v. Pontchartrain R.* 11 Rob. La. 24; *Slocum v. Fairchild*, 7 Hill, 292; *N. J. Steam Nav. Co. v. Merch. Bank*, 6 How. 344, 382; *Judson v. Western R.* 6 Allen, 486. See also *Thomas v. Boston & Providence R.* 10 Met. 472. In some cases, however, it has been held that if the notice is brought home to the knowledge of the party, he will be presumed to have contracted with reference to it, as in England, and the notice therefore will be binding. *Bean v. Green*, 12 Me. 422; *Sager v. Portsmouth R.* 31 Me. 228; *Camden & Amboy R. v. Baldauf*, 16 Penn. State, 67; *Atwood v. Reliance Transp. Co.* 9 Watts, 87; *Laing v. Colder*, 8 Barr, 479; *Barney v. Prentiss*, 4 Harris & J. 317. But, however the

Under a charter-party giving to the hirer the whole capacity of the

law may be as to the effect of a notice, it is well settled that a carrier may enlarge or diminish his liability by a special contract, and if he is not a common carrier may assume the risks and be liable as one. Thus, in *Fish v. Chapman*, 2 Kelly, 349, a person who undertook to carry goods, and deliver them in good order and condition, unavoidable accidents only excepted, was held liable as a common carrier. In *Gaither v. Barnet*, 2 Brev. 488, common carriers, who undertook to carry goods *safely*, were not exonerated by loss from *unavoidable accidents*. See also *Harmony v. Bingham*, 2 Kern. 99. But see *The Casco*, Daveis, 184. The general proposition, that a carrier can make a special contract, was assumed as law in England in *Kenrig v. Eggleston*, Aleyn, 98; *Southcote's Case*, 4 Coke, 84; *Gibbon v. Paynton*, 4 Burr. 2298, 2301, per *Yates, J.*; *Catley v. Wintringham*, Peake, 150. See also *Nicholson v. Willan*, 5 East, 507; *Harris v. Packwood*, 2 Taunt. 264; *Riley v. Horne*, 5 Bing. 217. The American authorities generally support the proposition. *Atwood v. Reliance Transp. Co.* 9 Watta, 87; *Hollister v. Nowlen*, 19 Wend. 234, 246; *Beckman v. Shouse*, 5 Rawle, 179; *N. J. Steam Nav. Co. v. Merch. Bank*, 6 How. 344, 383; *Swindler v. Hilliard*, 2 Rich. 286, 302; *Gordon v. Little*, 8 S. & R. 538; *Farmers' Bank v. Champlain Transp. Co.* 23 Vt. 186; *Kimball v. Rutland R.* 26 Vt. 247; *Davidson v. Graham*, 2 Ohio State, 131; *Graham v. Davis*, 4 Ohio State, 362; *Bentley v. Bustard*, 16 B. Mon. 648; *Baker v. Brinson*, 9 Rich. 201. In *Gould v. Hill*, 2 Hill, 623, a memorandum was given by the carrier stating the receipt of the goods, and adding, "which we promise to forward, dangers of fire, etc. excepted." The court held the carrier liable, although the goods were destroyed by fire, on the ground that such a special contract was against the policy of the law and could not be made. In the following cases it was also doubted whether such a contract would be of any effect. *Fish v. Chapman*, 2 Kelly, 349; *Hale v. N. J. Steam Nav. Co.* 15 Conn. 539. And in *Wells v. Steam Nav. Co.* 2 Comst. 204, 209, *Bronson, J.*, speaks of the question as being still, perhaps a debateable one. Such a position, however, cannot be supported on any principle of law whatsoever; and *Gould v. Hill* has been overruled by several cases in New York. *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Barb. 524; *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Dorr v. N. J. Steam Nav. Co.* 4 Sandf. 136, 1 Kern. 485. See also *Stoddard v. Long Island R.* 5 Sandf. 180. In three of these cases bills of lading were given, which contained exceptions against fire. As the goods were destroyed by fire, the courts held the carriers not responsible. It was, however, held by the supreme court of the State of Michigan, in the case of *Michigan R. v. Ward*, 2 Mich. 588, that as the plaintiffs were common carriers by their charter, which was in the nature of a contract between them and the State, permanently binding upon each, and the principal engagement on their part being to become and remain common carriers, their liability as common carriers became irrevocably fixed; and therefore they could not alter or modify this liability by any stipulation or contract. This case has been overruled in *Michigan R. v. Hale*, 6 Mich. 243. In *Schieffelin v. Harvey*, 6 Johns. 170, 180, *Van Ness, J.*, speaking of a special contract, said: "It ought to be clear, and capable of but one construction, unequivocally and neces-

ship, the owner thereof is not a common carrier, but a bailee to transport for hire.<sup>1</sup> Where a special contract is made to transport goods from one port to another, and the master refuses to sign bills of lading, but transports the goods, and the owner of the vessel afterwards libels them for freight, he is estopped from denying his liability to deliver the goods in as like good order as when received, with the usual exceptions.<sup>2</sup>

sarily evincing that such was the intention of both the parties." And in *The Brig May Queen*, 1 Newb. Adm. 464, where the following was stamped on a bill of lading: "Goods to be receipted for on the levee; not accountable for rust, breakage, leakage, cooperage; weight and contents unknown," the court held that this was not such a certain and specific contract between the parties as left no room for controversy. See also *Brittan v. Barnaby*, 21 How. 527. It has always been the settled doctrine in this country, that, though a carrier could make a special contract, yet he could not thereby be exempt from loss arising from his own negligence. *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 144; *Laing v. Colder*, 8 Barr, 479; *Dorr v. N. J. Steam Nav. Co.* 4 Sandf. 136; *Sager v. Portsmouth R.* 31 Me. 228; *Slocum v. Fairchild*, 7 Hill, 292; *Camden & Amboy R. v. Baldauf*, 16 Penn. State, 67; *Reno v. Hogan*, 12 B. Mon. 63; *Swindler v. Hilliard*, 2 Rich. 286; *Davidson v. Graham*, 2 Ohio State, 131; *Graham v. Davis*, 4 Ohio State, 362; *Baker v. Brinson*, 9 Rich. 201; *Stoddard v. Long Island R.* 5 Sandf. 180. The earlier cases in England are also to the same effect. *Smith v. Horne*, 8 Taunt. 144; *Beck v. Evans*, 16 East, 244; *Duff v. Budd*, 3 Brod. & B. 177; *Brooke v. Pickwick*, 4 Bing. 218; *Bodenham v. Bennett*, 4 Price, 31; *Birkett v. Willan*, 2 B. & Ald. 356; *Batson v. Donovan*, 4 B. & Ald. 21; *Garnett v. Willan*, 5 B. & Ald. 53; *Sleat v. Fagg*, id. 342; *Wright v. Snell*, id. 350; *Wyld v. Pickford*, 8 M. & W. 443; *Lyon v. Mells*, 5 East, 428. In England, before the Carrier Act of 1854, the carrier might make any contract he pleased. And it has been decided that where a person sent cattle by railroad, taking all risk of conveyance, the carrier would not be liable, though the cattle were lost by reason of the car in which they were put being utterly unfit for the purpose. *Chippendale v. Lancashire R.* 21 Law J. N. s. Q. B. 22, 7 Eng. L. & Eq. 395. See also *Shaw v. York R.* 18 Q. B. 347; *Carr v. Lancashire R.* 7 Exch. 707, 14 Eng. L. & Eq. 340; *Austin v. Manchester R.* 10 C. B. 454, 11 Eng. L. & Eq. 506; *Morville v. Great Northern R.* 21 Law J. N. s. Q. B. 319, 10 Eng. L. & Eq. 366; *Great Northern R. v. Morville*, 21 Law J. N. s. Q. B. 319; *York R. v. Crisp*, 14 C. B. 527; *Hughes v. Great Western R.* ib. 637; *Slim v. Great Northern R.* ib. 647. The Carriers Acts of 11 Geo. 4, & 1 Will. 4, c. 88, and the Railway and Canal Act 17 & 18 Vict. c. 81, do not apply to carriers by sea. *Peninsular Steam Nav. Co. v. Shand*, 3 Moore, P. C. N. s. 272. If however, there is an entire contract to carry partly by land and partly by sea, the acts apply, so far as the carriage by land is concerned. *Le Conteur v. London R. Law Rep.* 1 Q. B. 54.

<sup>1</sup> *Lamb v. Parkman*, 1 Sprague, 343.

<sup>2</sup> *The Water Witch*, 1 Black, 494.

The "dangers of the seas" are usually excepted in these bills; if the words are, "perils, or dangers of the river, or of the lakes, or of water, or of navigation," all which are used in different parts of this country, the meaning and effect is the same as of "dangers of the seas."<sup>1</sup> In one case the words "dangers of the roads" in a bill of lading were held to mean, either dangers peculiar to marine roads in which vessels lie at anchor, or those which are caused immediately by roads on land, as the overturning of carriages in rough and precipitous places.<sup>2</sup> Pirates are considered as "dangers of the sea."<sup>3</sup> Abbott, in his treatise on shipping,<sup>4</sup> says, that in consequence of the decision in *Smith v. Shepherd*, decided in England in 1795 (in which case, however, there does not seem to have been any bill of lading), the exception in common use in England is, "The act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted." The purpose of this alteration undoubtedly was to restore the bill of lading to the meaning and operation which it was supposed to have had before that case. We think, however, though this case (which we shall consider more fully in another connection) be law, that the term "dangers of the seas" includes substantially all that is comprehended in the latter part of the new phrase.

The courts sometimes seem to identify "dangers of the seas" with the "act of God," as meaning precisely the same thing.<sup>5</sup>

<sup>1</sup> In *Jones v. Pitcher*, 3 Stew. & P. 135, 176, the court said: "The perils of the sea and of the river are so nearly allied that they may be considered the same, except in the few instances in which the reason differs." See also *Turney v. Wilson*, 7 Yerg. 340; *Fairchild v. Slocum*, 19 Wend. 329; *Gordon v. Little*, 8 S. & R. 533; *Whitesides v. Russell*, 8 Watts & S. 44; *McGregor v. Kilgore*, 6 Ohio, 143; *Dunseth v. Wade*, 2 Scam. 285; *Johnson v. Friar*, 4 Yerg. 48; *Gordon v. Buchanan*, 5 Yerg. 71; *Williams v. Branson*, 1 Murph. 417; *Gilmore v. Carman*, 1 Smedes & M. 279; *Bentley v. Bustard*, 16 B. Mon. 643, 681.

<sup>2</sup> *De Rothschild v. Royal Mail Steam Packet Co.* 7 Exch. 734, 14 Eng. L. & Eq. 327. The bill of lading in this case covered also land carriage, and it was held that theft without violence while the goods were being transported by railway was not within the exception.

<sup>3</sup> *Gage v. Tirrell*, 9 Allen, 310; *Barton v. Wolliford*, Comb. 56; *Pickering v. Barkley*, Style, 132, 2 Roll. Ab. pl. 11, 248. In this case the plea was that the ship was taken *per quosdam ignotos homines bellicosos*. A distinction was attempted to be made by counsel between dangers of the sea and dangers on the sea.

<sup>4</sup> Abbott on Shipping, p. 322.

<sup>5</sup> *Fish v. Chapman*, 2 Kelly, 349, 356, 357; *Crosby v. Fitch*, 12 Conn. 410;

But this is certainly erroneous. Any act of God by means of which a vessel or her cargo was destroyed or damaged at sea, could hardly fail from being a peril of the sea. But there are a great many causes of damage for which the ship is not responsible, that are not acts of God.<sup>1</sup> When, by the ancient rule of the common law, the common carrier was held to insure against all losses but those caused by the "act of God or of the king's enemies," the reason and the meaning were, to hold him responsible if there were any possibility of his having any agency in the loss. And therefore the phrase "the king's enemies," was ruled not to include the violence of a mob, or riot, or civil commotion of any nature; but only the act of an enemy in public war,<sup>2</sup> which there was obviously no actual possibility of the carrier having caused; or, in case of any carrier by water, robbery by pirates, who are the universal enemies of mankind. But for embezzlements on board by the crew,<sup>3</sup> or by other persons not pirates, the owners are liable, although there is no negligence on their part.<sup>4</sup> And their liability

*Neal v. Saunderson*, 2 Smedes & M. 572; *Walpole v. Bridges*, 5 Blackf. 222; *Williams v. Grant*, 1 Conn. 487; *Ready v. Steamboat Highland Mary*, 17 Mo. 461, 20 id. 264.

<sup>1</sup> The distinction between "an act of God" and "a peril of the sea," is clearly defined in *McArthur v. Sears*, 21 Wend. 190, 198. The court say: "There is a considerable class of cases arising upon exceptions in bills of lading, of the 'perils of the sea,' where in addition to losses from natural causes, those arising from the acts of third persons are sometimes allowed to come within the terms. Such are losses by robbery of pirates. *Pickering v. Barkley*, Style, 132; *Buller v. Fisher*, *Abbott on Ship*. 385. But these words are evidently of broader compass than the words 'acts of God,' and although it was supposed by a very learned judge that they were but commensurate (*Gould, J. in Williams v. Grant*, 1 Conn. 487, 492), and therefore whatever was a peril of the sea would excuse the carrier acting under his general liability, yet it is evident from the cases we have considered that they are not always so." See also *The Schooner Reeside*, 2 Sumner, 567; *Gordon v. Buchanan*, 5 Yerg. 71; *Plaisted v. Boston Steam Nav. Co.* 27 Me. 132; *Trent Nav. Co. v. Wood*, 3 Esp. 127, 4 Doug. 287, per Lord Mansfield, C. J.

The earliest mention of the perils of the seas in a charter-party is in *Pickering v. Barkley*, Style, 132, per *Kent*, C. J., in *Elliott v. Russell*, 10 Johns. 1.

<sup>2</sup> *Forward v. Pittard*, 1 T. R. 27, 34, per Lord Mansfield, C. J.; *Story on Bailments*, § 25. See *Gage v. Tirrell*, 9 Allen, 310.

<sup>3</sup> *Schieffelin v. Harvey*, 6 Johns. 170; *Watkinson v. Laughton*, 8 Johns. 213.

<sup>4</sup> In *Morse v. Slue*, 1 Vent. 190, 238, and in *Barclay v. Cuculla y Gana*, 3 Doug. 389, the master was held liable for the loss of goods occasioned by a forcible robbery while the ship was lying in the river. In *Schieffelin v. Harvey*, 6

does not cease on the vessel being wrecked.<sup>1</sup> So the act of God is limited, as we conceive, to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the common carrier, the dangerous and difficult question whether he actually had any agency in causing the loss; for, if this were *possible*, he should be held.<sup>2</sup>

The cases are frequent in practice, and not unfrequent in the books, in which "dangers of the seas" has a very different meaning from "the act of God." Thus, a common carrier would be responsible for goods burned in his wagon, if they were destroyed in a conflagration which began at a distance by the act of an incendiary, and extended to the shed or barn in which he had put them, although he could prove he had nothing to do with the fire, and did all that the most careful and skilful man could do to save his goods.<sup>3</sup> And if such a conflagration reaches a ship moored at a wharf and destroys her, the shipper of goods destroyed in the

*Johns. 170*, which was an action against the owner of a vessel, on a bill of lading, it appeared that the vessel arrived at the port of destination with the goods on board, but they not being admissible, it was agreed between the master and the consignees that the goods should remain on board, and be returned to the owner when the vessel went back. On the goods being returned it was found that a portion had been taken, and the court held the defendant liable, whether the loss had been caused by the embezzlement of the crew or by the custom-house officers at the port of destination. In *King v. Shepherd*, 3 Story, 349, a robbery from the ship by salvors was held to be a loss for which the owners were liable.

<sup>1</sup> *King v. Shepherd*, 3 Story, 349; *Propeller Niagara v. Cordes*, 21 How. 7, 27.

<sup>2</sup> *The Zenobia*, Abbott, Adm. 80; *Fish v. Chapman*, 2 Kelly, 349, 356, 357; *Robertson v. Kennedy*, 2 Dana, 430; *Williams v. Grant*, 1 Conn. 487; *Bell v. Reed*, 4 Binn. 127; *Gordon v. Buchanan*, 5 Yerg. 71; *Jones v. Pitcher*, 3 Stew. & P. 135; *Sprowl v. Kellar*, 4 Stew. & P. 382; *Trent Nav. Co. v. Wood*, 4 Doug. 287, 270; *Forward v. Pittard*, 1 T. R. 27. The act of God must be the proximate cause of the loss. Therefore where a severe storm caused an unusually low tide, and in consequence thereof the carrier's barge struck against a timber which projected from the wharf, which in ordinary tides was too low to do any injury, the carrier was held liable. *New Brunswick S. B. Co. v. Tiers*, 4 Zab. 697. See also *Oakley v. Steam-Packet Co.* 11 Exch. 618, 34 Eng. L. & Eq. 530; *Smith v. Shepherd*, Abbott on Shipping, 383. So if an iron vessel runs on shore, owing to her compass not being sufficiently protected to traverse correctly, this is not a peril of the sea, or an act of God, which will exonerate the carrier. *Bazin v. Richardson*, U. S. C. C., Penn., 20 Law Rep. 129, 5 Am. Law Reg. 459.

<sup>3</sup> *Forward v. Pittard*, 1 T. R. 27. See also *Chevallier v. Straham*, 2 Texas, 115.

vessel would now look to the ship-owner. If the ship-owner were a common carrier, then the shipper would look to him under the general law of common carriers. If he were not a common carrier, and was bound only by a bill of lading, then he would be liable, provided fire be not "a peril of the seas." Usually there is now in most bills of lading an express exception against fire.

The simple question whether a loss by fire is a loss by a peril of the sea, which one would suppose must have been settled long since, is scarcely determined now. But the cases we give in the notes tend strongly and perhaps decidedly to the conclusion, that fire is *not* a peril of the sea, as between the ship-owner and shipper of goods.<sup>1</sup>

<sup>1</sup> If a ship is a common carrier, the same rules would be applicable, as in the case of a carrier on land, and therefore an owner of a vessel would be liable for a loss caused by an accidental fire, unless there was something in the bill of lading, the special contract between the parties, which exempted him from this liability. And, if a ship is not a common carrier, we think it equally clear that the owner would not be liable unless a bill of lading were given. The question then arises whether a fire, which is not caused by lightning, can be said to be either "an act of God" or "a peril of the sea." That it is not "an act of God" is settled in the following cases: *Harrington v. McShane*, 2 Watts, 443; *Hale v. N. J. Steam Nav. Co.* 15 Conn. 539; *Singleton v. Hilliard*, 1 Strob. 203; *Parker v. Flagg*, 26 Maine, 181; *Patton v. Magrath*, Dudley, S. C. 159. Although the proximate cause of the burning of the goods was a sudden gust of wind diverting the course of a distant fire so as to drive the flames in the direction of the goods, and thus destroying them. *Miller v. Steam Nav. Co.* 6 Seld. 431.

Is fire "a peril of the sea," as between the shipper and ship-owner? It is so asserted as well-settled law in *Plaisted v. Boston S. Nav. Co.* 27 Maine, 132, citing Marsh. on Ins. c. 12, § 3, and *Hale v. N. J. Steam Nav. Co.* 15 Conn. 539. In the first place, in the case of *Plaisted v. Boston S. Nav. Co.* the goods were damaged by a collision, and not by fire, and the expression of opinion is therefore *obiter*, and moreover the authorities cited do not support it. Marshall merely says that a policy of insurance covers a loss occasioned by an accidental fire. In *Hale v. N. J. Steam Nav. Co.* the only point decided was, that an accidental fire was not the act of God. No bill of lading was given. In *Gilmore v. Carman*, 1 Smedes & M. 279, a bill of lading was signed containing an exception against *dangers of the river*. Held, that this meant the same as perils of the seas, and that the carrier was liable for a loss by fire. See also *Morewood v. Pollok*, 1 Ellis & B. 743, 18 Eng. L. & Eq. 341; *N. J. Steam Nav. Co. v. Merch. Bank*, 6 How. 344; *Garrison v. Memphis Ins. Co.* 19 How. 312; *Parsons v. Monteath*, 13 Barb. 353; *Gould v. Hill*, 2 Hill, 623; *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Dorr v. N. J. Steam Nav. Co.* 4 Sandf. 136; *Swindler v. Hilliard*, 2 Rich. 286. And in *Airey v. Merrill*, 2 Curtis, C. C. 8, Mr. Justice Curtis held, that under a covenant in a charter-party to restore the vessel to the owners,

Loss by the explosion of a steam boiler is not a loss by the act of God.<sup>1</sup> So, too, if a man rolled a rock into the shallow channel of a river, and the first vessel that came along, having no cause to suspect any obstruction, struck upon it, this we should hold as certainly not an act of God,<sup>2</sup> but quite as certainly a "danger of the seas."<sup>3</sup> For we think that this phrase includes all the perils of every kind actually connected with navigation,<sup>4</sup> whether man did

"dangers of the seas excepted," the charterer was liable for the value of the vessel, in case of its destruction by an accidental fire originating on board, such fire not being one of the "dangers of the seas" within the exception. The only case in which fire has been held to be a "peril of the sea" is *Hunt v. Morris*, 6 Mart. La. 676. In *Hunters v. Morning Star*, Newfoundland Rep. 270, there is a *dictum* to the same effect. In that case the fire was caused by gross negligence in the construction of the chimney of a steamboat, and the carrier was held liable. The question of the liability of the carrier for loss by fire since the passage of the United States Act of 1851, will be considered hereafter.

<sup>1</sup> *McCall v. Brock*, 5 Strobb. 119. See also *Bulkley v. Naumkeag Steam Cotton Co.* 24 How. 386, *nom.* *The Bark Edwin*, 1 Sprague, 477.

<sup>2</sup> In *Friend v. Woods*, 6 Grat. 189, the vessel was injured by running on a bar which had recently been formed, and the goods damaged. No bill of lading was given. The court below ruled that though the defendants were ignorant of its formation, yet if, by human foresight and diligence, it might have been ascertained and avoided, they would be liable. It was held that the defendants were not prejudiced by this ruling, and the court said: "The cases in which the carriers have been exonerated from losses occasioned by such obstructions, will, I think, upon examination, be found to be cases in which either the bills of lading contained the exception 'of the perils of the river,' or in which that exception has been confounded with the exception of 'the act of God.'" The opinion of the court goes to the extent that that is not an act of God where human agency in any way co-operates. In *Smyrl v. Niolon*, 2 Bailey, 421, and in *Faulkner v. Wright, Rice*, 107, running on an unknown snag was held to be within the exception of the act of God. So in *Williams v. Grant*, 1 Conn. 487, where the vessel struck on an unknown rock. There was a bill of lading in this case, but the decision was rested on the loss being by an act of God. And in *Patton v. Magrath*, Dudley, S. C. 159, there is a *dictum* to the effect that the sudden shifting of the channel or the recent introduction of a hidden sawyer or snag are considered, when unknown, as acts of God.

<sup>3</sup> That running on a recent snag which could not be seen is within the exception "dangers of the river," see *Chouteaux v. Leech*, 18 Penn. State, 224, 229; *Turney v. Wilson*, 7 Yerg. 340; *Johnson v. Friar*, 4 Yerg. 48. So where the exception is "unavoidable accidents." *Eveleigh v. Sylvester*, 2 Brev. 178.

<sup>4</sup> Mr. Justice *Story*, in the case of the Schooner *Reeside*, 2 Sumner, 567, seems to have considered the meaning of the expression doubtful. He says: "The phrase 'danger of the seas,' whether understood in its most limited sense, as im-



or did not cause them, wholly or partially, provided it is certain that neither the ship-owner nor the shipmaster was in any fault, and that neither want of care, skill, or endeavor could be imputed to them.<sup>1</sup> If a vessel engaged in ocean navigation strikes a known rock or shoal, negligence would be imputed to the master; but it has been held that this principle does not apply to the navigation of the western rivers of this country.<sup>2</sup> If damage to goods is occasioned by a leak, the carrier to exonerate himself would be bound to show that it was caused by some stress of weather or other peril for which he is not liable.<sup>3</sup> If goods are gnawed by cockroaches<sup>4</sup> or rats, it is clear that the carrier is liable, for neither

porting only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

<sup>1</sup> The carrier must show that he used due diligence and proper skill to avoid the accident, and that it was unavoidable. *Whitesides v. Russell*, 8 Watts & S. 44.

<sup>2</sup> In *Collier v. Valentine*, 11 Misso. 299, the bill of lading contained the clause "unavoidable dangers of the river excepted." The vessel, a steamboat, struck on a sandbar, swung round, and had a hole made in her bottom by a snag. After citing *Abbott on Shipping*, p. 388, that, "If the situation of the rock or shallow is generally known, and the ship not forced upon it by adverse winds or tempest, the loss is to be imputed to the fault of the master," the court said: "This is the doctrine in relation to ocean navigation, where ships are furnished with maps and charts, on which shoals and rocks are designated, and where there is ample room to avoid them. But it is obvious that this doctrine cannot apply to the navigation of our inland rivers, where a vessel cannot avoid a bar or snag, and there is no other way but to pass over it. . . . The course usually pursued by skilful pilots in passing a bar or snag or dangerous place in the river must be the test by which the propriety of the conduct of a carrier is to be ascertained. This is not assented to in *Bentley v. Bustard*, 16 B. Mon. 643. If a boat attempts to pass in the night a point known to be dangerous, it is a question for the jury on all the circumstances of the case, whether such an act was negligent. *Ready v. Steamboat Highland Mary*, 17 Misso. 461, 20 id. 264.

<sup>3</sup> *The Sch. Emma Johnson*, 1 Sprague, 527; *Turney v. Wilson*, 7 Yerg. 340.

<sup>4</sup> In *The Miletus*, U. S. C. C. New York, 1866, *Nelson, J.*, cockroaches ate the labels pasted on the outside of the mats which enclosed chests of tea. This "embarrassed the assortment and delivery of the boxes to the consignees, and depreciated the market value of the same." Held, that the vessel was liable. *Nelson, J.*, said: "We also concur in the opinion that the rule must be regarded as settled in this court, that damages occasioned by vermin on board a ship to the cargo

of them are perils of the seas.<sup>1</sup> If, however, rats should cause a leak in a vessel, and goods should be damaged by water, we should consider the carrier liable, the damage by water being the proximate cause of the loss.<sup>2</sup>

When the cargo is lost or damaged by a collision between the carrier vessel and another, the liability of the carrier depends upon the nature of the collision, and also upon the obligation he has assumed. A collision may be caused by the fault of neither ship, that is, by inevitable accident; by the fault of the carrier ship, by the fault of the other ship, and by the fault of both. If neither vessel is in fault, the collision is clearly a peril of the seas,<sup>3</sup> and

in the course of the voyage is not the result of a peril of the sea, or of one of the dangers or accidents of navigation within the exception in the bill of lading."

<sup>1</sup> *Aymar v. Astor*, 6 Cow. 266. In *Laveroni v. Drury*, 8 Exch. 166, 16 Eng. L. & Eq. 510, where a cargo of cheese was damaged by rats, the defence was set up that the captain had two cats on board. This would have been sufficient to exonerate the carrier by the early maritime law. *Consolato del Mare*, c. 65, 66; *Casaregis*, disc. 23, n. 73; *Roccus*, n. 58; *Emerigon*, c. 12, s. 4, § 7, *Meredith's* ed. 302. But the court held that the carrier was liable, on the ground that damage done to goods by rats was not a peril of the seas, it being "a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea." The court also said: "We further are very strongly inclined to believe that, in the present mode of stowing cargoes, cats would offer a very slight protection, if any, against rats. It is difficult to understand how, in a full ship, a cat could get at a rat in the hold at all, or at least with the slightest chance of catching it." In *Kay v. Wheeler*, Law Rep. 2 C. P. 302, the carrier was held liable, although he had used every possible precaution to keep the rats out. *Laveroni v. Drury* has been followed in New York. *The Fame*, U. S. D. C. New York, *Shipman*, J. The defence was set up in this case that there were two cats on board.

<sup>2</sup> In *Laveroni v. Drury*, 8 Exch. 166, 16 Eng. L. & Eq. 510, *Pollock*, C. B., said, such a case might very likely be one of sea damage. And *Alderson*, B., added: "Our judgment does not touch that question. A rat making a hole in a ship, may be the same thing as if a sailor made one." See also *Garrigues v. Coxe*, 1 Binn. 592. But in *Dale v. Hall*, 1 Wilson, 281, a common carrier was held liable for damage done to goods by rats gnawing a hole in the vessel. See also *Hunter v. Potts*, 4 Camp. 203.

<sup>3</sup> *Buller v. Fisher*, 3 Esp. 67. In *Plaisted v. Boston Steam Nav. Co.* 27 Maine, 132, no bill of lading was given. The goods were damaged by a collision. No fault was imputable to either party, but as it was not caused by an act of God, or an inevitable accident, the defendants were held liable. But the court said that they would have been discharged, if a bill of lading had been given with an exception against perils of the sea.

under some circumstances may clearly be an act of God. If the carrier ship is in fault she is clearly liable.<sup>1</sup> If the other vessel is entirely in fault, the loss is not an act of God,<sup>2</sup> but is a peril of the seas,<sup>3</sup> and the liability of the carrier depends in such a case upon the obligation he has assumed. If both vessels are in fault the carrier is liable.<sup>4</sup> Where the damage is caused by a collision, it seems that at common law the owner of goods cannot sue the owners of the other vessel, unless the vessel on which his goods were is entirely free from blame.<sup>5</sup>

The ship-owner is clearly not liable for a loss caused by the intrinsic defect of the article carried,<sup>6</sup> and this includes not only loss by the decay of fruit,<sup>7</sup> but also loss caused by the tendency of certain liquors to effervesce,<sup>8</sup> or by the tendency of some products

<sup>1</sup> *Lloyd v. Gen. Iron Screw Collier Co.* 3 H. & C. 284; *Grill v. Gen. Iron Screw Collier Co.* Law Rep. 1 C. P. 600. See also *Phillips v. Clark*, 2 C. B. N. S. 156; *Marsh v. Blythe*, 1 McCord, 360; *Jones v. Pitcher*, 3 Stew. & P. 135; *Whitesides v. Thurlkill*, 12 Sm. & M. 599.

<sup>2</sup> *Mershon v. Hobersack*, 2 Zab. 372.

<sup>3</sup> *Hays v. Kennedy*, 41 Penn. State, 378; *The Steamboat New Jersey*, Olcott, Adm. 444, 448. But see *Marsh v. Blythe*, 1 McCord, 360.

<sup>4</sup> *Converse v. Brainerd*, 27 Conn. 607.

<sup>5</sup> In *Duggins v. Watson*, 15 Ark. 118, it was held that a shipper of goods on one vessel could not recover damages caused by a collision with another, from the other vessel, unless the vessel on which his goods were shipped was entirely free from blame. See also *Simpson v. Hand*, 6 Whart. 311; *Otis v. Thom*, 23 Ala. 469. In *New York Transp. Co. v. Philadelphia Steam Nav. Co.* 22 How. 461, the libel was brought by the owners of a barge against the owners of a steamer which ran into the barge. The barge at the time was being towed by a propeller. The court found that the propeller was in fault and that the steamer was not, and dismissed the libel. These cases proceed on the principle that a party, by shipping goods on board a vessel, so identifies himself with that vessel that if it cannot recover for the damages done by the collision, he cannot. In England this has been applied to the case of a passenger on a steamboat. *Cattlin v. Hills*, 8 C. B. 123. See also *Thorogood v. Bryan*, id. 115; *Rigby v. Hewitt*, 5 Exch. 240. But in New York a contrary doctrine is maintained. *Chapman v. New Haven R.* 19 N. Y. 341.

<sup>6</sup> In *Clark v. Barnwell*, 12 How. 282, *Nelson, J.*, states the rule as follows: "For it has been held, if the damage has proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight."

<sup>7</sup> *The Brig Collenberg*, 1 Black, 170; *Ship Howard v. Wissman*, 18 How. 231.

<sup>8</sup> See *Warden v. Greer*, 6 Watts, 424.

to leak from the casks in which they are shipped.<sup>1</sup> So if the damage is caused by the effect of humidity and dampness in the ship, by what is generally called sweat, that is, the condensation of vapor in the hold caused by the transition from a warm to a cold climate, the carrier is not liable, if there is no defect in the ship or navigation of the same, or in the stowage.<sup>2</sup>

Although the conduct of the master or owner be negligent, yet if the loss occurs from independent causes, the ship-owner is not responsible.<sup>3</sup>

Thus if goods are stowed on deck which should be in the hold, and are washed off in a tempest, although this be the act of God, yet human default has co-operated, and the ship is responsible ;<sup>4</sup> but if the ship founders in the tempest and goes down, she is no more responsible for the goods on deck than for those in the hold. So the master is bound to stow the goods aright, with proper dunnage, etc., and in such arrangement and position as the character

<sup>1</sup> In *Nelson v. Woodruff*, 1 Black, 156, lard was shipped at New Orleans for New York in July. On arrival much of it had leaked out. It appearing in evidence that lard when liquified expanded and loosened the hoops on casks, and thus occasioned leakage, held that the carrier was not liable.

<sup>2</sup> In *Clark v. Barnwell*, 12 How. 272, a quantity of cotton thread was shipped at Liverpool, under a common bill of lading for a voyage to Charleston, S. C. On its arrival, the thread was found to be stained and spotted by dampness and mould caused by the humidity of the atmosphere of the hold, in a long passage, and by the transition from a colder to a warmer climate. The court held that damage caused by humidity, in the absence of any defect in the ship, or navigation of the same, or in the stowage, was a peril of the sea, for which the carrier was not liable. In *Lamb v. Parkman*, 1 Sprague, 343, an action was brought on a charter-party for freight. The defence was set up that the goods were damaged by *sweat*. The vessel came from Calcutta, and the damage was caused by the condensation of vapor in the hold by the transition from a warm to a cold climate, producing moisture directly under the upper deck, whereby the upper part of the cargo was injured. Judge *Sprague* held, that, as the goods were stowed in the usual manner, the ship-owners were not responsible for the damage, and freight was therefore due. See also *McKinlay v. Morrish*, 21 How. 343; *Baxter v. Leland, Abbott*, Adm. 348.

<sup>3</sup> See *post*, p. 263, n. 1.

<sup>4</sup> *The Rebecca, Ware*, 188; *The Waldo, Daveis*, 161; *Stinson v. Wyman*, id. 172; *Waring v. Morse*, 7 Ala. 343; *Dorsey v. Smith*, 4 La. 211; *The Peytona, Ware*, 2d ed. 541, 2 Curtis, C. C. 21; *Sayward v. Stevens*, 3 Gray, 97; *Gardner v. Smallwood*, 2 Hayw. N. C. 349. See also *Taunton Copper Co. v. Merch. Ins. Co.* 22 Pick. 108.

of the goods, their liability to break, etc., requires.<sup>1</sup> But though he fail in these respects, and damage happens to the goods thus badly stowed, he is not answerable if he can show that the damage did not happen *because* they were badly stowed.<sup>2</sup> If the loss *might*

<sup>1</sup> *Sack v. Ford*, 13 C. B. N. s. 90; *Rochereau v. Bark Hausa*, 14 La. Ann. 481. In *Hutchinson v. Guion*, 5 C. B. N. s. 149, an action was brought against ship-owners for negligently and carelessly stowing salt cake, whereby it sustained damage. The first plea of the defendant stated that the damage arose from the goods being delivered in bulk and not in casks, and between and among other goods; that it was stowed in bulk with the knowledge and by the direction and license of the plaintiffs to the defendants, given before and during such stowage. The plea was held bad, on the ground that it could not be considered as setting up a leave and license to act with carelessness; that it meant no more than that the plaintiff had authorized the salt cake to be stowed in bulk, and that did not amount to an authority to stow it in a careless or negligent manner. The fifth plea alleged that salt cake was a corrosive and destructive substance, rotting casks and cask hoops in contact with it, which plaintiffs knew, but which defendants did not know, and that it was the duty of the defendants to have informed the plaintiffs of the fact in order to the proper stowage of the same; that the defendants improperly and negligently delivered the salt cake in bulk and not in casks; that plaintiffs thereby and otherwise represented to defendants, and caused defendants to believe, that salt cake might be put in contact with casks without danger, and that putting it between casks was a proper mode; that in this belief the cakes were stowed between casks of salt provisions, that the salt cake rotted the casks, and the brine ran out and did the damage. Replication, that salt cake is an article well known in trade and commerce, and the nature and properties of it are well known in trade, &c.; that it is an article commonly carried in ships, and that its nature and properties are commonly and well known to carriers in ships, and that before and at the time of shipment the defendants well knew that the goods were salt cake. Held that the plea was good, and that the replication was no answer to it; that the plaintiffs delivered to the defendants an article which they knew was likely to cause injury to other goods with which it came in contact, and that it was no answer that the defendants might and ought to have known its character. See *The Helene*, *Brow. & L. Adm.* 429.

<sup>2</sup> *The Brig Casco*, *Daveis*, 184; *Hastings v. Pepper*, 11 Pick. 41; *The Schooner Reeside*, 2 Sumner, 567; *The Newark*, 1 Blatchf. C. C. 208; *Clark v. Barnwell*, 12 How. 272; *Rich v. Lambert*, *id.* 347. See also *Glover v. Dufour*, 6 La. Ann. 490; *Bearse v. Ropes*, 1 Sprague, 381. In *Baxter v. Leland*, *Abbott, Adm.* 348, 1 Blatchf. C. C. 526, it was held that where there is a well-known usage as to the manner of stowage, and to the placing of different products together, the shipper, if he wishes his goods stowed in a different manner, must give notice to the master, and if he does not, and his goods are injured in consequence of such stowage, the ship-owner will not be liable. See also *Lamb v. Parkman*, 1 Sprague, 343; *Clark v. Barnwell*, *supra*; *The Bark Col. Ledyard*, 1 Sprague, 530. See *contra* *Cranwell v. Ship Fanny Foedick*, 15 La. Ann. 436. It was held in *Swainston v.*

have happened without the master's fault, this does not excuse him; but if it *must* have happened, although he had not been in fault, he is exonerated.<sup>1</sup>

If the shipper provides the dunnage, the vessel is not responsible for its insufficiency to an indorsee of the bill of lading.<sup>2</sup> And generally it is sufficient if the master provides the kind of dunnage ordinarily in use at the port of shipment for the description of goods carried.<sup>3</sup> Where damage to goods is attributable partly to the fault of the carrier, and partly to the fault of the shipper, and it is impossible to ascertain for what proportion each is responsible, the loss will be equally divided between them.<sup>4</sup> If the owners of a chartered ship are in possession by their servants, the master and crew, they are liable for damage done by improper stowage to the goods of a shipper who is ignorant of the charter-party,<sup>5</sup> although the goods are stowed by a stevedore appointed by the charterer.<sup>6</sup> But the master is not liable in such a case to the shipper.<sup>7</sup>

The owners of a general ship are liable to a shipper for damage done to the goods from other goods stowed in the hold, without al-

Garrick, Exch. of Pleas, Trin. Term, 1853, 11 Law J. 255, that where a shipper was to send a person to stow the goods, the master would not be liable if they were improperly stowed. See also *Arnold v. Anderson*, 2 Yeates, 93.

<sup>1</sup> Thus, in *Gardner v. Smallwood*, 2 Hayw. N. C. 349, the court said: "Taking a full price and stowing upon deck, will subject the owner of the vessel to pay damages, if what is placed on deck be *thereby* lost, or damaged; but if *that* did not occasion the loss, he will be no more liable for damage to that part of the cargo than to the rest." See also *The Waldo*, Daveis, 161, 171, per *Ware*, J.; and *Lawrence v. Minturn*, 17 How. 100, *post*, p. 266, n. 4. In *Vernard v. Hudson*, 3 Sumner, 405, it was held that where the goods were shipped on deck without the consent of the owner, but were delivered in good order, the consignee was bound only to pay a deck freight, and Mr. Justice *Story* intimated that at common law no freight whatever would be due.

<sup>2</sup> *The Ville de l'Orient*, Irish Adm. 2 Law Times, N. S. 62.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Snow v. Carruth*, 1 Sprague, 324.

<sup>5</sup> *The St. Cloud*, Brow. & L. Adm. 4.

<sup>6</sup> *Sandeman v. Scurr*, Law Rep. 2 Q. B. 86.

<sup>7</sup> In *Blaikie v. Stenbridge*, 6 C. B. N. s. 894, affirmed in Exch. Ch. ib. 911, the vessel was under a charter-party which provided that the stevedore was "to be appointed by the charterer, but to be paid by and act under captain's orders." The charterer put the vessel up as a general ship. The master exercised no control over the stevedore, and was not on board when the plaintiff's goods were laden. Held that the master was not liable, the stevedore not being his agent.

legation or proof of any wilful or negligent default on the part of the ship-owner.<sup>1</sup> And it would seem that they are so liable, even if the goods doing the injury were put on board in a condition to do mischief, by the shippers of the damaged goods, the proximate cause of the injury being the stowage of them by the captain too near the other goods.<sup>2</sup>

<sup>1</sup> *Gillespie v. Thompson*, cited 6 Ellis & B. 477, note, 36 Eng. L. & Eq. 227; *Brousseau v. Ship Hudson*, 11 La. Ann. 427. But see *Baxter v. Leland, Abbott, Adm.* 348, 1 Blatchf. C. C. 526. In *The Bark Col. Ledyard*, 1 Sprague, 530, a general ship took some barrels of flour and also some spirits of turpentine belonging to different shippers. The effluvium from the turpentine injured the flour. Held that the carrier was liable, and that the measure of damages was the difference between the fair market value of the flour and such value if it had not been injured. It was said that if the carrier could have shown an established usage to carry breadstuffs and spirits of turpentine together in a general ship from New Orleans, the carrier would not have been liable. See also *Cranwell v. Ship Fanny Fosdick*, 15 La. Ann. 436; *Bearse v. Ropes*, 1 Sprague, 331; *The Sch. Reeside*, 2 Sumner, 567; *The Fanny Fosdick*, 4 Blatchf. C. C. 374. In *The Invincible*, U. S. D. C. Mass. 1868, *Lowell, J.*, casks of oil were shipped from San Francisco to Boston. On arrival there was found to be a considerable loss by leakage, caused by the shrinkage of the casks. This shrinkage, it was alleged, was produced by heat caused by stowing dry hides and rags too near the casks. There being a special contract in the case exonerating the vessel from loss by leakage, the burden was held to be on the libellants to show that the loss was caused by the fault of the carrier. *Lowell, J.*, in deciding against the libellants, said: "Upon the whole evidence I am satisfied that this loss did not arise from the fault of the ship itself, nor from the want of care and skill of the claimants' agents in stowing or navigating her, but from the operation of causes which, whether common to all such voyages or not, were common to all in which the vessels happened to have just such a cargo, and that such a cargo is not uncommon, but usual and proper, and that the ship was stowed in the usual and proper manner."

<sup>2</sup> *Alston v. Herring*, 11 Exch. 822, 36 Eng. L. & Eq. 475. The defendant's plea in this case set up a charter-party, by which the defendant, as owner, chartered the ship to the plaintiffs, and agreed to load a cargo from the plaintiff's factors, and carry and deliver it. It also alleged that the plaintiffs shipped the goods mentioned in the declaration, and also contracted with a third party to receive from him and carry certain cases of sulphuric acid for freight to be paid to the plaintiffs, and that it was the duty of the plaintiffs as the shippers to give notice to the owners of the ship of the article being sulphuric acid, in order that it might be stowed in some place where, if it leaked, it would not come in contact with other parts of the cargo; that no notice was given, that they caused the cases to be stowed near the goods mentioned in the declaration, and that some of the acid leaked and damaged the goods, and so prevented the defendant from performing the agreement, and that the damage was occasioned by the plaintiff's neglect. The court held this plea to be bad; *Alderson, B.*, said: "It is true the plea alleges

The question has arisen whether shippers are not answerable to the owners of the vessel, for putting on board dangerous goods, or goods insufficiently packed, the dangerous character of which cannot be discovered by easy inspection, and it is not made known to the owners by the shippers; and it would seem that they are so liable.<sup>1</sup> So, if a ship is chartered and the owner is obliged to pay the shippers for damage done to their goods by the goods of the charterer, he is entitled to compensation from the charterer

that but for the shipment of the acid without notice, the damage would not have happened. But the shipment alone would not be enough. A further act would be necessary, namely, the placing of the acid where it was placed in the ship, and that was the defendant's act, and he was the immediate causer of the damage." In answer to the objection that the suit could not be maintained, because in a cross action the defendants would have to refund the sum demanded, the court said: "In such an action might not the plaintiffs well contend that though the defendant would not have put the cases where he did had he known the contents, yet as he was content to run the risk of their containing some fluid which might have caused the damage, it would be unreasonable to make the plaintiffs liable for the whole damage, because it turned out that the cases contained sulphuric acid? We think so. It is true the plea states the cases were placed where they were without any neglect, default, or wrongful act of the defendant. That means no more than that the so placing them was neither neglect nor intrinsically wrong. Be it so. But it is certain had the contents of the cases been some fluid, and not sulphuric acid, which had escaped and damaged the cambric, the plaintiffs would have been entitled to recover, whether the defendant had been negligent or not. We think, therefore, a jury might take that into their consideration in estimating the damages which the now defendant would sue the plaintiffs for, on the supposed contract not to ship sulphuric acid without notice, and consequently the damages in such an action might be different from those recoverable in this action, and that the rule for preventing circuity of action does not apply." See *The Helene*, *Brow. & L. Adm.* 429.

<sup>1</sup> *Brass v. Maitland*, 6 *Ellis & B.* 470, 36 *Eng. L. & Eq.* 221. The fourth plea of the defendants was held to be good. It was that the master knew, or had the means of knowing, and reasonably might, could, and ought to have known that the goods shipped, namely, bleaching powder, contained chloride of lime, and that the master and persons employed about the ship knew and had the means of judging and knowing the state and condition and sufficiency of the casks. But the court were not unanimous in respect to a plea, setting forth that the master knew or had the means of knowing and ought to have known the nature of bleaching powder. One of the judges was inclined to dissent from the decision holding the plea good, on the ground that the master was not the party generally concerned in the shipping, taking on board, or stowing of goods. See also *Alston v. Herring*, 11 *Exch.* 822, 36 *Eng. L. & Eq.* 475; *Hutchinson v. Guion*, 5 *C. B. n. s.* 149; *Farrant v. Barnes*, 11 *C. B. n. s.* 553; *Ohrlhoff v. Briscall*, *Law Rep.* 1 *P. C.* 231.



although the charterer did not know and had no cause to suspect that his goods would cause any damage.<sup>1</sup> And if a shipper puts on board, without the knowledge of the captain, goods which are forbidden to be exported, he is liable if the ship is seized.<sup>2</sup>

Goods on deck, when jettisoned from necessity, cannot claim contribution in general average by the general law merchant.<sup>3</sup> And if they are so carried by agreement with the shipper, he can have no claim against any party for the loss.<sup>4</sup> But if carried there without his consent, and then jettisoned from necessity, it should seem that the shipper should claim from the ship-owner what he loses by having no claim for contribution; for though it was not the fault of the master that the goods were lost, it is his fault that

<sup>1</sup> *Pierce v. Winsor*, 2 Sprague, 35.

<sup>2</sup> *Sparks v. West*, 1 Wash. C. C. 238.

<sup>3</sup> See *post*, ch. 9.

<sup>4</sup> In *Lawrence v. Minturn*, 17 How. 100, it was held that where iron boilers had been stowed on deck with the consent of the shipper, and were jettisoned by necessity, the owner of the vessel would not be liable. Mr. Justice *Curtis*, in delivering the opinion of the court, after speaking of the maritime codes, said: "There is not one of them which gives a recourse against the master, the vessel, or the owners, if the property lost had been placed on deck with the consent of its owner; and they afford very high evidence of the general and appropriate usages, in this particular, of merchants and ship-owners. *Consolato del Mare*, par Pardessus, c. 186; *Ord. de la Mar. Valin*, lib. 2, tit. 1, art. 12; *Code du Com. Mar. par Locré*, art. 229, lib. 2, tit. 4, art. 229; *Emerigon*, ch. 12, sec. 42; *Boulay Paty*, tom. 4, 566, 568." And again: "The extent to which we understand the authorities to go, and the law which we intend to lay down, is this: That if the vessel is seaworthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety, by a storm, though that storm in all probability would have produced no injurious effect on the vessel if not thus laden. If the vessel is in itself staunch and seaworthy, and her inability to resist a storm arises solely from the position of a part of the cargo on deck, the owner of the cargo, who has consented to this mode of shipment, cannot recover from the ship or its owners, on the ground of negligence, or breach of an implied contract respecting seaworthiness." See also *Smith v. Wright*, 1 Caines, 43; *Dorsey v. Smith*, 4 La. 211; *Hampton v. Brig Thaddeus*, 4 Mart. La. 582; *Shackleford v. Wilcox*, 9 La. 33; *Cram v. Aiken*, 13 Maine, 229; *Sproat v. Donnell*, 26 Maine, 185; *Johnston v. Crane*, 1 Kerr, New Brunswick, 356; *Sayward v. Stevens*, 3 Gray, 97.

their loss gives no claim for contribution.<sup>1</sup> The burden is on the ship-owner to prove that the shipper agreed that the goods should be carried on deck.<sup>2</sup>

We shall treat of this subject more fully in the chapter on General Average.

If goods are carried on deck without the consent of the shipper, and are lost by a peril of the seas, the owner will be responsible, although the bill of lading contained a clause excepting the liability of the owner for a loss by perils of the sea. For this exception does not lessen his obligation to carry the goods in the proper and customary manner.<sup>3</sup>

## SECTION IX.

### WHO MAY SUE FOR NON-DELIVERY OF THE GOODS OR INJURY TO THEM.

If there be a refusal to deliver the goods, or a delivery to a wrong person, or damage to, or loss of the cargo, for which the ship is responsible, the next question is, Who may make the claim for the goods, or their value, or for compensation for damage, and sustain an action grounded upon it? The consignor has shipped the goods, but has shipped them to the consignee; and which of these parties should make the claim? There has been some conflict, and may yet be some uncertainty in respect to this question; but we think the general principles applicable to this question ought to be sufficient to decide it.

Thus, if goods are shipped by the order of A, and an unindorsed bill of lading is sent to him, and he nevertheless gets possession of the goods by stating to the captain that he is the owner, the

<sup>1</sup> *The Paragon*, Ware, 322; *Barber v. Brace*, 3 Conn. 9; *Creery v. Holly*, 14 Wend. 26; *Gould v. Oliver*, 2 Man. & G. 208, 4 Bing. N. C. 134, 2 Scott, N. R. 241.

<sup>2</sup> *The Peytona*, 2 Curtis, C. C. 21.

<sup>3</sup> *The Rebecca*, Ware, 188; *The Waldo*, Daveis, 161; *Stinson v. Wyman*, Daveis, 172; *Waring v. Morse*, 7 Ala. 343. But if no damage results from their being put on deck, the owner of the vessel will not be liable for injury happening from any other cause, and the shipper must pay freight. *Gardner v. Smallwood*, 2 Hayw. N. C. 349; *Vernard v. Hudson*, 3 Sumner, 405. See *ante*, p. 263, n. 1.

ship-owner is responsible to one to whom an indorsed bill of lading is sent.<sup>1</sup> But it has been held that if the first party who gets possession of the goods in this way does not know that an indorsed bill is sent to anybody else, the holder of the indorsed bill has no remedy against him.<sup>2</sup> In this case the holder of the goods had an equitable title to them; but if a party has received the goods who has no title to them, both he, and the master who delivered them, should be responsible to him who has the title. But if an indorsed bill be sent, and the goods obtained under it, the master is not bound to respond for the goods to one to whom another indorsed bill was subsequently sent; but, on the contrary, if this other gets possession of the goods, the first consignee may bring trover against him for them.<sup>3</sup>

If goods are sent to a consignee, with an indorsed bill of lading, the property to be the consignee's on delivery, no question can be made but that he may sue for damages if the goods are injured. But it has been said that if they are to remain the consignor's property, being sent to the consignee only for sale, or if the consignee is for any purpose only the agent for the consignor, then the action must be in the consignor's name. We doubt this, however; and prefer the cases in which it is held that the consignee may bring the action in his own name. In the first place he has a special property in them, for his commissions, charges of entry, etc., and is certainly entitled to their possession; and if he be a mercantile agent for any purpose, he would, in almost every case, have some degree of special property in them, of this kind.

There are supposable cases, perhaps, in which goods may be sent to one who is so nakedly an agent of the owner for merely receiving what is brought in the condition in which it comes, that he can bring no action whatever in his own name, either for the goods themselves, or for any injury done to them. Generally, however, we should say the rule of law was, that a consignee with an indorsed bill, or any commercial agent authorized to take and hold possession of the goods, and deal with them as factor or in any such way, might bring an action in his own name, either for the

<sup>1</sup> *Brandt v. Bowlby*, 2 B. & Ad. 932.

<sup>2</sup> *Coxe v. Harden*, 4 East, 211.

<sup>3</sup> *Walley v. Montgomery*, 3 East, 585.

goods themselves if they were withheld, or for compensation if they were delivered in an injured condition.<sup>1</sup>

<sup>1</sup> It is laid down in some cases that the party who employs the carrier is the one to sue. *Davis v. James*, 5 Burr. 2680; *Moore v. Wilson*, 1 T. R. 659; *Freeman v. Birch*, 1 Nev. & M. 420, 3 Q. B. 492; *Joseph v. Knox*, 3 Camp. 320. Where the property is to vest in the vendee on delivery to the carrier, the vendee must sue, because the vendor in making the contract with the carrier acted merely as the agent of the vendee. *Dawes v. Peck*, 8 T. R. 330; *Coats v. Chaplin*, 3 Q. B. 483; *Dunlop v. Lambert*, 6 Clark & F. 600. In *Van Casteel v. Booker*, 2 Exch. 691, 708, *Parke*, B., said: "The contract for carriage, which the bill of lading is, is made expressly with the consignor, and he no doubt might sue upon it, though in making it he was merely acting as agent of and for the consignee. But if he made it as agent for and on behalf of the consignee, the consignee, also, as being the real principal, might sue if there had been a breach of the contract to carry." The bill of lading in this case made the goods deliverable to the consignor. But the cases generally adopt the rule that the party having the right of property and the right of possession is the one to sue, whether consignor or consignee. *Tindal v. Taylor*, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210, 216; *Potter v. Lansing*, 1 Johns. 215; *Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 B. & P. 582; *Brown v. Hodgson*, 2 Camp. 36; *Fragano v. Long*, 4 B. & C. 219; *Ludlow v. Bowne*, 1 Johns. 1; *De Wolf v. N. Y. F. Ins. Co.* 20 Johns. 214; *Price v. Powell*, 3 Comst. 322; *Everett v. Saltus*, 15 Wend. 474; *Jones v. Sims*, 6 Port. 138; *Isley v. Stubbs*, 9 Mass. 65; *The Venus*, 8 Cranch, 253; *The Merrimac*, 8 Cranch, 317; *The Frances*, 9 Cranch, 183; *The Frances*, 8 Cranch, 354; *Swain v. Shepherd*, 1 Moody & R. 223; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Mitchel v. Ede*, 11 A. & E. 888; *Dows v. Cobb*, 12 Barb. 310. In *Moore v. Sheridine*, 2 Har. & McH. 453, the goods were to be delivered by the bill of lading to Mr. Hollingsworth, or at the head of Elk. The consignor brought an action for the non-delivery. The court held that the goods being deliverable to H., or other persons at the head of Elk, the action was well brought by the consignor, but did not determine whether the action could have been supported if the goods had been deliverable to one person only. In *Griffith v. Ingledew*, 6 S. & R. 429, goods were shipped by the consignor on his own account and risk, but they were deliverable by the bill of lading to the consignee or his assigns. It was held that the consignee might maintain an action in his own name for damage done to the goods. The decision was put on the ground that the legal property in the goods passed, by the bill of lading, to the consignee, although he held it in trust for the consignor. Chief Justice *Gibson*, however, dissented. The earlier cases are commented on at great length, and the case is worthy of a careful perusal. Whether the rights of the consignee to such an extent are supported by the weight of authority, it is well settled that *prima facie* the property in the goods will be considered to be in him, and he will be entitled to sue, in the absence of proof to the contrary. *Lawrence v. Minturn*, 17 How. 100; *McKinlay v. Morrish*, 21 How. 343, 356; *The Ship Middlesex*, U. S. C. C. Mass., 21 Law Rep. 14; *Webb v. Winter*, 1 Cal. 417; *Ogden v. Coddington*, 2 E. D. Smith, 317; *Tronson v. Dent*, 8 Moore, P. C. 419, 36 Eng. L. & Eq.

One remark may be added ; it is that the master of a ship will very seldom do wrong, or incur any responsibility, by adhering rigorously to the letter of his contract, and complying exactly with the obligations he assumes by the bill of lading.

It seems very clear that to entitle a party to sue he must either have the right of property in the goods, or else must be a party to the contract with the carrier. What is evidence of such a contract is sometimes a matter of doubt. Thus in a case in Massachusetts, where a party who at the request of his friend on his deathbed promised him, in case he died, to send his body home to be buried with his mother, after his death obtained a coffin and purchased a box in which to forward it, and shipped the coffin in the box on board a vessel, and paid to the owners of the vessel the price for which they had agreed with a sister of the deceased since his death to carry the body, of which agreement the sister had informed him ; the court held that he could not recover for the breach of the contract of carriage without further proving a special contract to carry the body.<sup>1</sup>

41 ; *Coleman v. Lambert*, 5 M. & W. 502. See also *Snow v. Carruth*, 1 Sprague, 324. In a late case decided by the Supreme Court of Massachusetts, *Blanchard v. Page*, Boston Daily Advertiser, Nov. 25, 1856, the action was brought for damages done to goods carried in the defendant's ship from Boston to New Orleans. The bill of lading was in the usual form, stating that the merchandise was "to be delivered in like good order, dangers of the sea excepted, to Gaines & Co., he or they paying freight." Gaines & Co. were agents to receive the goods at New Orleans and transmit the same to various parties and places. The goods arrived in a damaged condition, and this action was brought by the shippers to recover damages. Part of the merchandise was purchased of the plaintiffs by a party in Arkansas, who requested them to act as his agents in shipping the goods, procuring insurance, etc. The merchandise so purchased was paid for by a note which included insurance, and this note was afterwards taken up. The consignors were not owners of the goods, and the court did not consider that the defendants had made any contract with them, but that the promise to deliver was to the consignees. It was held, therefore, that they could not recover. Subsequently, however, the court were of opinion that the consignors might maintain an action in their own names for the benefit of the consignees. *Blanchard v. Page*, 8 Gray, 281. See also *Cooke v. Wilson*, 19 C. B. 153, 37 Eng. L. & Eq. 361. In *Sargent v. Morris*, 3 B. & Ald. 277, the property in the goods was in the consignors. The bill of lading contained the agreement to deliver to the consignors and in their name to the consignee or his assigns. Held that the consignee could not sue.

<sup>1</sup> *Driscoll v. Nichols*, 5 Gray, 488. The language of the court is, "The plaintiff had no legal interest in this dead body, by reason of which he could maintain

## SECTION X.

## RULE OF DAMAGES FOR BREACH OF CONTRACT OF AFFREIGHTMENT.

In an action against a carrier for the non-delivery of goods, the rule of damages is the value of the goods at the place of delivery, at the time when they should have been delivered.<sup>1</sup> Whether interest should be allowed in all cases has been questioned, but we think it should be, for otherwise the shipper cannot be fully indemnified.<sup>2</sup> The value at the port of delivery is the net value deducting freight and expenses;<sup>3</sup> and the market value governs, and not the value for any particular use.<sup>4</sup> In a recent case in New

this action against a carrier without proof of a special contract with himself. And there was in our opinion, no evidence in the case which would have warranted the jury in finding such a special contract." But why would not the jury be amply warranted in finding that the sister acted as the agent of the plaintiff in making the contract, and that the defendant was estopped from denying the contract after receiving the price for the transportation from the plaintiff?

<sup>1</sup> *Spring v. Haskell*, 4 Allen, 112; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Arthur v. Sch. Cassius*, 2 Story, 81; *Gillingham v. Dempeey*, 12 S. & R. 188; *Ringgold v. Haven*, 1 Calif. 108; *Hart v. Spalding*, id. 213; *Dean v. Vaccaro*, 2 Head, 488; *Warden v. Greer*, 6 Watts, 424. In *Lakeman v. Grinnell*, 5 Bosw. 625, goods were purchased in Connecticut and shipped at New York for Liverpool. The vessel and goods were destroyed by fire at New York. The court held that the value of the goods in New York was the measure of damages. See *King v. Shepherd*, 3 Story, 349; *Krohn v. Oechs*, 48 Barb. 127. In *The Mary Hawes*, U. S. D. C. Mass. *Lovell*, J., fish were shipped from Gloucester to New York. On arrival they had no market value, owing to their damaged state, caused by a delay for which the vessel was responsible. They were sent back to Gloucester, where they had a market value, and were sold at a loss. Held that the libellants were justified in returning them.

<sup>2</sup> In *Spring v. Haskell*, 4 Allen, 112, *Chapman*, J., states the rule to be to allow interest from the time when the goods should have been delivered. This is stated generally and without qualification. From the report of the case in 14 Gray, 309, it appears that the goods shipped were unlawfully sold by the master at an intermediate port. Interest was allowed in *Warden v. Greer*, 6 Watts, 424.

In New York, it is said that interest does not follow as a matter of course, and is not to be allowed unless the carrier was actually in fault. *Watkinson v. Laughton*, 8 Johns. 214; *Amory v. McGregor*, 15 Johns. 24; *Lakeman v. Grinnell*, 5 Bosw. 625. Interest was allowed in admiralty in New York in 1867. *The Patrick Henry*, *Shipman*, J., U. S. D. C. New York.

<sup>3</sup> *Wallace v. Vigus*, 4 Blackf. 260; *McGregor v. Kilgore*, 6 Ohio, 358.

<sup>4</sup> *Cutting v. Grand Trunk R.* 13 Allen, 381; *Collard v. South Eastern R.* 7 H. & N. 79. See also *Gardner v. Field*, 1 Gray, 151; *The Steamboat New Jersey*, *Olcott*, Adm. 446.

York,<sup>1</sup> an action was brought to recover damages for undue delay in delivering a case of braid used in the manufacture of ladies' hats. The vessel arrived on the 17th of September, and proceeded at once to discharge. Through the fault of the delivery clerk, this case was not delivered with the rest of the cargo, but was sent to a public store and was not delivered to the libellant until the 20th of October. The contents of the case were in the same good order as when received. The goods were imported to be sold wholesale to the trade, and there was no change in the value of the article until the 5th of October, when its value was diminished over fifty per cent by reason of the fact that the season for disposing of the article to the trade then ended. It was held that this diminution of value could be recovered as damages.

An interesting question has arisen as to the rule of damages when foreign money is shipped under a bill of lading to this country, and the vessel fails to deliver it, and it has been held that the money must be considered as a commodity, and that its market value must be paid.<sup>2</sup>

If the goods are only partially lost, the shipper cannot abandon them to the ship-owner and claim their entire value,<sup>3</sup> and the ship-owner is entitled to deduct the freight from the value, and also all expenses which are chargeable to the goods. In other words the ship-owner is only liable for the net value of the goods.<sup>4</sup> If the

<sup>1</sup> The City of Dublin, 1 Bened. Adm. 46.

<sup>2</sup> The Ship Patrick Henry, *Shipman*, J., U. S. D. C. New York, 1867. Suit for non-delivery of a bag of English sovereigns. The language of the learned judge is as follows: "The agreement in this bill of lading is not to pay money, but to transport certain articles on freight. Whether these articles were gold coins, gold bars, gold dust, or gold in any other form of use or ornament, can make no difference. Like every other article placed on freight and covered by a bill of lading, unless delivered according to the terms of the contract of affreightment, their value may be recovered by the holder of the bill. That value is to be estimated in the currency of the country in which the port of delivery is situated and where the suit is brought, unless otherwise provided for in the contract itself. The proof is that these sovereigns were worth in the market, at the time they should have been delivered, \$7.05 apiece in our money. Our recent legal tender act and the decisions under it have no application to this part of the case."

<sup>3</sup> Henderson v. Ship Maid of Orleans, 12 La. Ann. 352.

<sup>4</sup> Gillingham v. Dempsey, 12 S. & R. 188; Atkisson v. Steamboat Castle Garden, 28 Misso. 124; Arthur v. Sch. Cassius, 2 Story, 81; The Patrick Henry, U. S. D. C. New York, 1867, *Shipman*, J.

owner of the goods receives the whole or any part of the goods at any intermediate port, on the refusal of the carrier to fulfil his contract, the acceptance is no bar to a suit, but it can be shown in mitigation of damages.<sup>1</sup> If the consignee has sold the goods before arrival, and is prevented from fulfilling his contract by a breach on the part of the carrier, this is not to be considered in assessing the damages.<sup>2</sup>

Where a cargo of goods was delivered in a damaged condition, caused by the fault of the master, and it was sold by the consignees with the consent of the master, and the evidence showed that it would have sold better had the damaged part been separated from the rest, but that it would have been tedious and troublesome to have done so, it was held that it was the duty of the master, and not of the consignees, to have made such separation.<sup>3</sup>

Sales by auction are commonly resorted to, to ascertain the value of damaged merchandise, and when fairly conducted afford strong evidence of the market value.<sup>4</sup>

<sup>1</sup> *Bowman v. Teall*, 23 Wend. 308; *Cox v. Peterson*, 30 Ala. 608; *Lowe v. Moss*, 12 Ill. 477; *Atkisson v. Steamboat Castle Garden*, 28 Miss. 124.

<sup>2</sup> *The St. Cloud*, Brow. & L. Adm. 4.

<sup>3</sup> *The Columbus*, Abbott, Adm. 37.

<sup>4</sup> See *The Columbus*, Abbott, Adm. 37, 97.



## CHAPTER VIII.

## OF CHARTER-PARTY.

## SECTION I.

## WHAT CONSTITUTES A CHARTER-PARTY.

WE have considered the use of the ship by the owner, in carrying his own goods, or those of others, under bills of lading only. He may, however, prefer to let his ship out to others, for their use. This is commonly done by a *charter-party*; an instrument of frequent use and great importance among merchants. No especial form is necessary, and it is quite common to introduce into it any stipulations or provisions which the peculiar character of the voyage or the purposes of the parties may require. Indeed, we say of this contract, as of the sale of a ship and the contract of insurance, that while it is undoubtedly the proper and usual way to reduce the contract to writing, and have it evidenced and defined by a written document, yet we do not know of any rule of law in this country making this indispensable.<sup>1</sup> But, after the charter-party is signed, any material alteration or addition to it by a party or his agent, will make it null and void, though the alteration was made without any fraudulent design.<sup>2</sup> And it would seem that the rule is the same where the alteration is made by a stranger.<sup>3</sup> And

<sup>1</sup> The French Code de Commerce and the Ordonnance de la Marine, prescribe that the contract shall be reduced to writing. Code de Commerce, art. 273; L'Ord. de la Marine, liv. 3, tit. 1, art. 1. Valin is of the opinion, however, that it is good by parol. Commentaire sur L'Ord. liv. 3, tit. 1 art. 1; Molloy, de Jure Maritimo, b. 2, c. 4, § 3, states that it is generally in writing but may be by parol. See also Taggard v. Loring, 16 Mass. 336; Perry v. Osborne, 5 Pick. 422; Cutler v. Winsor, 6 Pick. 335; Thompson v. Hamilton, 12 Pick. 425; Vinal v. Burrill, 16 Pick. 401, 406; Muggridge v. Eveleth, 9 Met. 233, 236; The Phebe, Ware, 263.

<sup>2</sup> See City of Boston v. Benson, 12 Cush. 61.

<sup>3</sup> In Croockewit v. Fletcher, 1 H. & N. 893, 40 Eng. L. & Eq. 415, which was

when the charter-party is in writing, parol evidence is not admissible to vary its terms.<sup>1</sup>

As a charter-party may be by parol, the rights and liabilities of the parties to it with respect to a third person are fixed when the contract is complete, and are not affected by a subsequent instrument in writing.<sup>2</sup>

It has been contended that a charter-party is a conveyance within

an action by an owner of a vessel against the charterers for refusing to take the vessel, the defendants pleaded that whilst the agreement was in the possession of the plaintiff, it was, without the knowledge or consent of the defendants, altered in material particulars (setting them forth); that the alteration was not made in correction of any mistake or to further the intention of the parties, by reason whereof the agreement became void. It appeared in evidence that after the charter-party was signed, the agent of the plaintiff made the alterations complained of, and stated the fact to the defendants when he handed the instrument to them; and on their saying that they did not know whether they would accept it with the alterations, he said that he had made the alterations on his own responsibility, and would strike them out at once. The defendants afterwards refused to accept the instrument. The court said: "We also think that the addition to or alteration of the charter is a fatal objection to the plaintiff's right to maintain the action. It is no doubt apparently a hardship that where what was the original charter-party is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent intention, and by a person not a party to the contract, a perfectly innocent man should thereby be deprived of a beneficial contract; but, on the other hand, it must be borne in mind that to permit any tampering with written documents would strike at the root of all property; and that it is of the most essential importance to the public interest that no alteration whatever should be made in written contracts, but that they should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, erasure, or obliteration." *Pigott's Case*, 11 Rep. 26, and *Davidson v. Cooper*, 11 M. & W. 778, were cited. The replication of the plaintiff stated that the alteration was made by a stranger, but the court said that if this had been proved to be true the defendants would have been entitled to a judgment *non obstante veredicto*.

<sup>1</sup> *The Eli Whitney*, 1 Blatchf. C. C. 360; *Pitkin v. Brainerd*, 5 Conn. 451. Any stipulation not inserted in the contract will be considered as waived. *Renard v. Sampson*, 2 Kern. 561, 2 Duer, 285. But in *Almgren v. Dutilh*, 1 Seld. 28, where a vessel was let, reserving what was necessary for the accommodation of the officers and crew, evidence of a conversation pending negotiations for a charter-party, in regard to the part necessary, was admitted.

<sup>2</sup> *Swanton v. Reed*, 35 Maine, 176. The defendant in this case verbally chartered his part of the vessel on the first of the month, and on the tenth a charter-party was signed and sealed. The plaintiff furnished supplies on the third, and it was held, that the defendant was not liable.

the meaning of the act of 1850,<sup>1</sup> and therefore, unless recorded, is void except as to persons having notice of it. But the courts are inclined to take a different view, and to consider the act as not applying to a charter-party.<sup>2</sup>

Formerly, charter-parties, being a kind of maritime indenture, were sealed; but we infer from the books that the omission of the seal is general now in England, as well as in this country, where, indeed, it is quite universal. No advantage whatever is obtained by putting a seal to the instrument; and, although we have some doubts whether all the technical rules in regard to specialties would be now applied to a sealed charter-party, it is certain that such instruments have received a narrow and merely technical construction within a few years, and the contract would probably be embarrassed by the use of a seal at present. For particulars of the difference, we refer to our note.<sup>3</sup>

An agreement that the parties will hereafter make a charter-party, is not, in law or in fact, the same thing as a charter-party. But an agreement for a future charter-party which contains all the terms and provisions of the instrument, and which appears to

<sup>1</sup> Chap. 27, § 1, 9 U. S. Stats. at Large, 440.

<sup>2</sup> *Mott v. Ruckman*, 3 Blatchf. C. C. 71; *Hill v. The Golden Gate*, 1 Newb. Adm. 308.

<sup>3</sup> The chief differences which exist between a charter-party under seal, and one not under seal, are these. If the owner of a ship has no agent in a foreign country, the master, *virtute officii*, being an agent of the owner, can let the ship by charter-party, within the usual course of her employment. *Hurry v. Hurry*, 2 Wash. C. C. 145; *Ward v. Green*, 6 Cow. 178. And if he is shown to have been master, he will be deemed to continue to hold that character, until some overt act or declaration of the owners displaces him from that situation. *The Sch. Tribune*, 3 Sumner, 144, 149. If a charter-party is made by the master in his own name, under seal, the owner of the vessel cannot sue upon it, in his own name, although it was made for his benefit. *Bristow v. Whitmore*, 1 H. R. V. Johns. Ch. 96, 107. But he may sue in the name of the master. *Bristow v. Whitmore*, 4 De Gex & J. 325. But he cannot make a charter-party under seal, in the name of his principal, if only authorized by parol, because a deed under seal must be made by the party himself, or by another for him in his presence; or in his absence, by an agent authorized by a deed under seal. *Horsley v. Rush*, reported in *Harrison v. Jackson*, 7 T. R. 209; *Pickering v. Holt*, 6 Greenl. 160. Again, in contracts not under seal, if the agent intends to bind his principal, it will be sufficient, if it appear from the contract that he acts as agent, but in those under seal, if he does not use the name of his principal, he alone will be liable. *Andrews v. Estes*, 2 Fairf. 267; *New England Mar. Ins. Co. v. De Wolf*, 8 Pick. 56.

be treated as a charter-party by the parties, will be so regarded by the courts; or, what would be the same thing, this agreement, together with the facts, would be evidence of a contract made but not written.<sup>1</sup> The principles have been applied to this question which have led the court to regard a promise to accept a bill of exchange as an acceptance;<sup>2</sup> and an agreement to lease, as a lease.<sup>3</sup>

If the charter-party is signed by an agent purporting to be such, as "A by B. agent," the agent is not liable for a breach,<sup>4</sup> although his principal resides out of the country.<sup>5</sup>

<sup>1</sup> The Schooner *Tribune*, 3 Sumner, 144. The instrument in this case was as follows: "I hereby agree, within three days, to be ready at Hampden, with a new suit of sails on the *Tribune*, to load for T. W. Leston (the libellant), and proceed without delay to Lubec, to take in what may be wanted to constitute her cargo, and proceed to Havana, and back to any port of the United States; also, that the charter-party shall not commence until she is loaded at Lubec, provided I am not detained over seven days in loading said vessel." Signed by the master. On the same paper, immediately below this, was the following memorandum, signed by the libellant: "I agree to allow said vessel on said charter-party, five hundred Spanish dollars per month. The charter to be made at Lubec." Mr. Justice Story held, that though the meaning of this instrument was, that the charter-party should be made at Lubec, yet that it might be treated as a charter-party, which, though loose and informal, still contained the substantial provisions of such an instrument; and that the making of a more formal instrument under such circumstances might be treated rather as a further assurance than as the inception of a maritime charter-party. See also *Lidgett v. Williams*, 4 Hare, 456, 462.

<sup>2</sup> *Clarke v. Cock*, 4 East, 57, 69; *Wynne v. Raikes*, 5 East, 514; *Ex parte Dyer*, 6 Ves. 9; *Pillans v. Van Mierop*, 3 Burr. 1663; *Payson v. Coolidge*, 2 Gallis. 233, 2 Wheat. 66; *Russell v. Wiggin*, 2 Story, 213; *Ulster County Bank v. McFarlan*, 3 Denio, 553.

<sup>3</sup> *Warman v. Faithfull*, 5 B. & Ad. 1042.

<sup>4</sup> In *Deslandes v. Gregory*, 2 Ellis & E. 602, the charter-party recited that it was entered into between the owners of the ship and Messrs. G., Brothers, as agents to Samuel Ferguson, *merchants and charterers*. The owners agreed also to take such goods as the *charterers* or their agents should send, and should reload from the agents of the said merchants, &c. It was signed, "For Samuel Ferguson, G., Brothers, as agents." It was contended that the use of the words *merchants and charterers* in the plural showed that the signers were liable as principals, but the court held that they were not liable. Affirmed in the Exchequer Chamber, 2 Ellis & E. 610. A charter-party made by A B, describing himself as agent of C D, and signed A B, is the contract of A B. *Parker v. Winlow*, 7 Ellis & B. 942. As to what is the proper way for an agent to sign in order to hold his principal liable, see 1 *Parsons on Contracts*, 5th ed. p. 54. See *ante*, p. 276, n. 3.

<sup>5</sup> *Bray v. Kettell*, 1 Allen, 80.

## SECTION II.

## OF THE GENERAL PROVISIONS OF A CHARTER-PARTY.

The charter may be formed in either of two ways. It may provide, that the owner lets and the charterer hires the whole capacity and burden of the vessel, except so much as is necessary for the accommodation of the officers and crew, the storage of provisions, sails, anchors, cables, etc.,<sup>1</sup> in which case it is in its nature a contract whereby the owner agrees to carry a cargo which the charterer agrees to provide. Or it may provide for an entire surrender of the vessel to the charterer, who then hires her as one hires a house, takes her empty, and provides the officers, crew, provisions, etc. Of these two modes of chartering, the first is much the more frequent in practice. The distinction between them is sometimes important in its bearing upon the question, whether the owner or the hirer is in possession of the vessel, in such wise as to have the rights, and incur the liabilities, which grow out of possession. As a general rule, words of demise in the charter-party do not pass the possession, if there are other provisions in the instrument which qualify and restrain them;<sup>2</sup> the whole contract must be construed together, and due effect given to every clause.<sup>3</sup> It therefore becomes a matter of some difficulty to state with precision any general rules on the subject, for the same expression will sometimes require a different interpretation in different instruments according to the context. It seems, however, to be gen-

<sup>1</sup> In *Almgren v. Dutilh*, 1 Seld. 28, the charter-party contained such a stipulation, and it was also agreed that should the captain take freight in his cabin, the charterers should furnish it at the current rates. It was held, that the officers and crew were entitled to be accommodated in the mode suitable to their station, the character of the vessel and the nature of the voyage being taken into consideration, and that if the captain and crew gave up their usual quarters and occupied more confined ones, they were entitled to freight for the part given up.

<sup>2</sup> It was held in *Hutton v. Bragg*, 7 Taunt. 14, that if the charter-party contained words of demise, the possession passed to the charterer, notwithstanding other provisions in the instrument which were inconsistent with this supposition. But this case is clearly not the law. It is overruled in *Christie v. Lewis*, 2 Brod. & B. 410. See also *Dean v. Hogg*, 10 Bing. 345; *Palmer v. Gracie*, 4 Wash. C. 110; *Hoe v. Groverman*, 1 Cranch, 214; *Clarkson v. Edes*, 4 Cow. 470.

<sup>3</sup> *Marquand v. Banner*, 6 Ellis & B. 232, 36 Eng. L. & Eq. 136; *Belcher v. Capper*, 4 Man. & G. 502, 541; *Clarkson v. Edes*, 4 Cow. 470.

erally the rule, that the party that mans the vessel is to be considered as in possession.<sup>1</sup> But this may be rebutted by clear evidence to the contrary.<sup>2</sup> If one party appoints the captain and the

<sup>1</sup> *Palmer v. Gracie*, 4 Wash. C. C. 110; *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 39; *The Sch. Volunteer*, 1 Sumner, 551; *McIntyre v. Bowne*, 1 Johns. 229; *Holmes v. Pavenstedt*, 5 Sandf. 97; *Ruggles v. Bucknor*, 1 Paine, C. C. 358; *Tuckerman v. Brown*, 17 Barb. 191. In *Certain Logs of Mahogany*, 2 Sumner, 589, Mr. Justice *Story* said, that the clause relative to the owner's appointing the master and crew, victualling and equipping the ship, was strong *prima facie* evidence that the general owner was to remain in possession, and that he would be entitled to it if it was uncertain in whom possession was to vest. In *Dean v. Hogg*, 6 Car. & P. 54, 10 Bing. 345, a person hired a steamboat for the day for a pleasure excursion, the owner hiring the master and crew. It was held that the hirer had not such exclusive possession as would justify him in turning off a stranger who had come aboard, but that his proper remedy was against the owner for a breach of contract. We do not question the general principles laid down in this case, that the owner had the general possession of the vessel, but a contract similar to that made is essentially one for the free, exclusive, and undisturbed use and enjoyment of a part of the boat for a certain time and for certain purposes; and for the protection and preservation of this use, a power of excluding trespassers is necessary, and therefore such a right of possession as is requisite to its existence should be implied by law. This right of possession is not necessarily exclusive of the possession of another for a different purpose, and may perfectly well consist with a simultaneous possession in the master and crew for the purpose of navigation or any other similar object. It was not the mere entry of the plaintiff on board the boat which made him a trespasser against the defendants, but his entry for a purpose inconsistent with their exclusive enjoyment of their part of the boat, and we presume that if he had withdrawn to those parts of the boat to which their privilege did not extend, as to the engine-room, or the quarters of the crew, the defendants would then have had no right to expel him from the boat.

It was held in *Parish v. Crawford*, 2 Stra. 1251, *Abbott on Ship*. 42, that, where the charterer was to have the freight of goods and the owner the freight of passengers, and he appointed the master, and covenanted with the charterer for his good behavior and the condition of the ship, the owner was liable for a breach of a contract of affreightment entered into by the master with a third person. *Abbott* doubts the correctness of this decision, and cites *James v. Jones*, 3 Esp. 27, and *Mackenzie v. Rowe*, 2 Camp. 482. This case, however, appears to us to be correctly decided, and the cases cited by *Abbott* are not necessarily of authority against it, for the forms of the charter-parties are not set forth in the respective decisions.

In *Campbell v. Perkins*, 4 Seld. 430, the defendants owned a line of boats and chartered one of them to another company for a single trip, they, however, retaining the command of it and navigating it. Held that they were liable for the loss of a passenger's baggage.

<sup>2</sup> Per *Story, J.*, in *Certain Logs of Mahogany*, 2 Sumner, 589; *Drinkwater v.*

other pays him, he is generally considered as holding the possession of the vessel for the party appointing him.<sup>1</sup> But the mere fact of there being a person on board appointed by the owner who was to have the sole charge of the vessel, with power to displace the charterer for the breach of any covenant in the charter-party, would not render the general owners liable for a breach of a contract of affreightment.<sup>2</sup> If the general owners held out any false colors, which might induce a belief that the ship would sail under their control, they would be liable as owners; but the circumstance that one of the owners was on board, and was introduced to the injured party as such, and made inquiries as to the probability of obtaining freight, and that the custom-house documents remained

Brig *Spartan*, Ware, 149, 160, per Ware, J. And in *Lyman v. Redman*, 23 Maine, 289, it was held that the captain did not become the owner *pro hac vice*, merely by victualling and manning the vessel, and by receiving a share of the profits, but that he must have the entire control and direction of the vessel, and the owner must surrender all control over it.

<sup>1</sup> Thus in *McGilvery v. Capen*, 7 Gray, 523, it was held that a master employed by the owners of a vessel, though paid by the charterer, had no claim upon the charterer for his services, after the wreck of the vessel, on the ground that the charterers were not the owners *pro hac vice*, and that their agreement to pay ceased on the wreck of the vessel. So in *Lander v. Clark*, 1 Hall, 355, the owners were to keep the vessel tight, and pay the charge of victualling and manning her, the charterer was to appoint the master, and put such goods on board as he thought proper, and was to pay port charges, pilotage, etc., and to deliver up the vessel on his return. Held that the owners had parted with their possession. In *Fenton v. Dublin Steam-Packet Co.* 1 Per. & D. 103, 8 A. & E. 835, an action was brought against the owners of a steam-packet for injuries done to the plaintiff's vessel by negligence of the crew of the steam-packet. The vessel was under a charter-party at the time of the alleged wrong, the charterer paying the captain and crew, and all disbursements, harbor dues, pilotage, etc. The owners appointed the captain, crew, and engineers. The captain obeyed the orders of the charterer as to where the vessel was to go, but not as to the mode of navigation. The court held that the crew were the servants of the owners, and that the owners were therefore liable.

<sup>2</sup> *Newberry v. Colvin*, in the Exchequer Chamber, 7 Bing. 190, reversing the decision of the Queen's Bench, 8 B. & C. 166. The judgment of the Exchequer Chamber was affirmed in the House of Lords, 1 Clark & F. 283, 6 Bligh, N. R. 167. In this case the master was the charterer at a certain rate per month. He was to provide all necessaries, and pay and defray all port charges, and pilotage, and remit all freight bills for the homeward cargo to a firm in London to hold as security for the balance of freight due the owners, if any. The owners were to have an agent on board with the powers stated in the text.

unchanged, is not such a holding out as makes them liable.<sup>1</sup> The master may hire the vessel as well as a stranger, and this may be done either for a stipulated sum, or on shares. The owner may contract to pay the master half the profits in lieu of wages, and the master may in such a case be considered as holding the vessel as agent for the owners.<sup>2</sup> But generally there is no distinction between the rights and liabilities of the parties, whether the vessel is let to the captain or to a stranger.<sup>3</sup> And one owner may hire the vessel from the others in the same way and with the same responsibilities.<sup>4</sup> The more frequent practice at the present day, when the master hires a vessel, is for him to take it on shares, in which case he is considered as having the entire control and possession of the vessel.<sup>5</sup>

<sup>1</sup> Pitkin v. Brainerd, 5 Conn. 451. In Tuckerman v. Brown, 17 Barb. 191, it was said that "the owner of a vessel is never made liable as a carrier, merely by virtue of his ownership. The vessel must also have been in his employment, so as to make him a party to the contract for carriage."

<sup>2</sup> The Nathaniel Hooper, 3 Sumner, 542, 575; Arthur v. Sch. Cassius, 2 Story, 81. It is, however, to be remarked that these cases were against the ship *in rem*, and it is well settled that a charterer has the power to bind the vessel, though he cannot bind the owners. See *ante*, p. 174, note. The language of Story, J., however, it would seem, was intended to apply equally to the case of an action against the owners *in personam*. See also Lyman v. Redman, 23 Maine, 289, preceding page. Where the owner of a vessel signed and delivered to the master a writing, directing him where to proceed with the vessel and how to employ her, instructing him to use his best exertions to obtain a freight for the benefit of all concerned; authorizing him to represent her as a first-rate vessel, copper-fastened throughout, two years old, and in good order; enjoining him to use all suitable care to keep her in proper condition; to be cautious in the selection of the commission merchants he might employ; to obtain offers to purchase her, and to communicate them to the owners; to remit the earnings to them; and for his services as master, and for victualling, manning, and one half the port charges, he was to receive one half of all freights, primage, or earnings of the vessel, the other half to belong to the owners, deducting the wages of one seaman; it was held that this instrument was not a charter-party, and did not exempt the general owners of the vessel from liability for necessary supplies for the voyage, furnished on the master's order. Latham v. Lawrence, 18 Conn. 299.

<sup>3</sup> Hallet v. Col. Ins. Co. 8 Johns. 272; Reeve v. Davis, 1 A. & E. 312.

<sup>4</sup> McLellan v. Reed, 35 Maine, 172. In this case a stipulated price was to be paid, and the owner was held not to be liable for repairs, supplies, or outfits.

<sup>5</sup> Webb v. Peirce, 1 Curtis, C. C. 104, reversing s. c., 1 Sprague, 192; Thompson v. Snow, 4 Greenl. 264; Thomas v. Osborn, 19 How. 22; Perry v. Osborne, 5 Pick. 422; Cutler v. Winsor, 6 Pick. 335; Winsor v. Cutts, 7 Greenl. 261; Houston v. Darling, 16 Maine, 413; Williams v. Williams, 23 Maine, 17; Sprout v. Donnell, 26 Maine, 185; Taggard v. Loring, 16 Mass. 386; Thompson v. Hamilton, 12 Pick. 425; Mott v. Ruckman, 3 Blatchf. C. C. 71.



And there is no difference between a fishing voyage and any other in this respect.<sup>1</sup>

When the earnings of a vessel let on shares are collected, they are equally the money of the owner and master, and the latter becomes a trustee of the owner's share. And if a third person, knowing all the facts, is authorized by the master to receive the freight already earned, and promises to pay the owner his share, and afterwards receives the money, he holds it for the use of the owner, and the latter may sue him for it.<sup>2</sup> It has been said that if goods are furnished to a vessel, and the defendants are proved to have been the owners at the time, the presumption is that the goods were furnished for their benefit, and the burden of proof is on them to show that the vessel was not then in their possession.<sup>3</sup> The general principles above laid down apply also to the case where a vessel is chartered by government, and the rule seems to be that the owners are generally liable, if they pay and maintain the officers and crew, although there be a superior officer on board appointed by the government, unless the loss occur by reason of an order of such officer.<sup>4</sup>

The charter may be for one or more voyages ; or for any time certain.<sup>5</sup> It may also be — like a tenancy at will — without any definite term expressed in the contract ; and then the law implies a reasonable term, requiring the parties to regard the contract as remaining in force during the whole of any voyage which is under-

<sup>1</sup> *Mayo v. Snow*, 2 Curtis, C. C. 102. In *Harding v. Souther*, 12 Cush. 307, it was held that the owners of a vessel engaged in the mackerel fishery were liable for the wages of the cook, employed by the master, the court being of the opinion that the master of the vessel was not the owner *pro hac vice*, on the facts of the case.

<sup>2</sup> *Williams v. Williams*, 23 Maine, 17.

<sup>3</sup> *Blackstock v. Leidy*, 19 Penn. State, 335.

<sup>4</sup> *Fletcher v. Braddick*, 5 B. & P. 182 ; *Hodgkinson v. Fernie*, 2 C. B. N. S. 415, 40 Eng. L. & Eq. 306. In *Trinity House v. Clark*, 4 M. & S. 288, an action was brought against an owner of a vessel for tolls in respect of certain lights, etc., on the coast. The vessel was chartered to the Transport Board. The general owner furnished the master and crew, but it was held that he was not liable. The decision proceeded partly on the ground that the construction which enabled the government to enforce a prompt obedience to its terms should be adopted, and that it was more for the benefit of the government to consider it in possession, than to compel it to resort to an action for a breach of the contract if any took place.

<sup>5</sup> *Havelock v. Geddes*, 10 East, 555 ; *McGilvery v. Capen*, 7 Gray, 525.

taken by the charterer, before reasonable notice of the intention to terminate the lease is given him by the owner. But, with this exception, such a charter-party is determinable at the pleasure of either party.<sup>1</sup>

The charter-party usually expresses the burden of the ship, and ought always to do so correctly. And if there is an error in this respect, made wilfully and knowingly by the owner, he cannot make it the ground of any claim for the charter-money. As if he stated the burden too high, in order to cheat the charterer into giving him, in a gross sum, more than would have been given for the actual tonnage; or if he puts it in a charter by the ton too low, and thereby induces the charterer to engage to fill her, which otherwise he would not do; in neither case can he profit by his falsehood. And the fraud in such a case would probably render the contract entirely void.<sup>2</sup> But it seems to be settled that, if the owner makes a false representation in ignorance and in good faith, respecting the burden, whether he makes it too high or too low, the charterer is bound by the terms of the bargain.<sup>3</sup> So, if the

<sup>1</sup> *Cutler v. Winsor*, 6 Pick. 335.

<sup>2</sup> In *Johnson v. Miln*, 14 Wend. 195, an action was brought on the charter-party to recover the price agreed on for the use of the vessel. It was held that the defendant could show that false representations as to her capacity, anterior to the contract, had been knowingly and fraudulently made by the plaintiff. It was also admitted in *Hunter v. Fry*, *infra*, note 3, that if fraud could have been shown, the decision would have been different. In *Johnson v. Miln*, the defendant only claimed to retain a sum sufficient to compensate him for the damages he had sustained in consequence of the deceit. The question did not therefore arise, whether the contract was rendered entirely void, or not. But, as a general rule, fraud vitiates every contract.

<sup>3</sup> *Hunter v. Fry*, 2 B. & Ald. 421. In this case the vessel was described in the charter-party as being of the burden of two hundred and sixty-one tons or thereabouts. The ship could carry four hundred tons. The shipper put on board two hundred and sixty. The court held that as the misrepresentation did not appear to be fraudulently made, the shipper was bound to load a full cargo, as much as the ship could safely carry, and not having done so, they decreed that the plaintiff should recover as damages the freight which he would have earned had a full cargo been shipped. See also *Baker v. Windle*, 6 Ellis & B. 675, 36 Eng. L. & Eq. 162, 37 Eng. L. & Eq. 96. In *Ashburner v. Balchen*, 3 Seld. 262, the charter-party described the vessel as of the burden of one hundred tons or thereabouts. The vessel was of one hundred and forty-two tons burden. As no fraud was shown, the contract was held valid. See also *Thomas v. Clarke*, 2 Stark. 450. Molloy, in his treatise, "De Jure Maritimo," book 2, ch. iv. § 8, states the law as

charter states the national character of the vessel erroneously, it is said to be no defence to an action against the charterer for not lading a cargo on board of her. But if it was in fact unsafe or illegal to send that cargo in that vessel, and there could have been no contract had her true nationality been known, it would seem that the charterer should be discharged.<sup>1</sup>

If a vessel is described in a charter-party as "A 1," this only warrants that she was "A 1," at the time of making the charter-party, and not that she should continue to be so.<sup>2</sup>

It is common to provide for the state of the ship and for her repairs in the bargain; the usual way being for the owner to stipulate that she is sound, staunch, and altogether seaworthy; and also that he will keep her in repair, the perils of the seas excepted. If, however, the contract expresses no such stipulations, it is probable that the law would make them.<sup>3</sup> Generally, the charterer is bound to victual and man the vessel in the absence of any agree-

follows: "If a ship shall be freighted and named to be of such a burden, and being freighted by the ton shall be found less, there shall no more be paid than only by the ton for all such goods as were laded aboard. If a ship be freighted for two hundred tons or thereabouts, the addition of thereabouts is commonly reduced to be within five ton, more or less, as the moiety of the number ten, whereof the whole number is compounded."

From two recent decisions in regard to the sale of goods, these principles may be deduced. First, that if the owner, in mentioning the burden of the ship in the charter-party, should insert the clause, "say not less than five hundred tons," this would be a warranty that she should be, at least, of five hundred tons burden. *Leeming v. Snaith*, 16 Q. B. 275, 3 Eng. L. & Eq. 365. Second, that it was merely, "say from six hundred to seven hundred," and there was no fraud, the vessel need not be even of six hundred tons burden. *Gwillim v. Daniell*, 2 Crompt. M. & R. 61, 1 Gale, 143, 5 Tyr. 644. In *Pembroke Iron Co. v. Parsons*, 5 Gray, 589, an agreement was made to sell "a cargo of old railroad iron, to be shipped per barque Charles William, at thirty dollars per ton, delivered on the wharf at the port of discharge, dangers of the seas excepted, — about 300 or 500 tons." It was held that this was complied with by a delivery at the port of discharge of as much as that vessel, if seaworthy and in good order, can carry, though only two hundred and twenty-seven tons. An action will not lie *in rem* for a misrepresentation in regard to the tonnage of the vessel. *The Eli Whitney*, 1 Blatchf. C. C. 360.

<sup>1</sup> *Rousse v. Meyers*, 3 Camp. 475.

<sup>2</sup> *Hurst v. Osborne*, 18 C. B. 144, 36 Eng. L. & Eq. 299.

<sup>3</sup> *Putnam v. Wood*, 3 Mass. 481; *Ripley v. Scaife*, 5 B. & C. 167, per *Bayley*, J. See also *Kimball v. Tucker*, 10 Mass. 192.

ment to the contrary.<sup>1</sup> If the parties choose to make different or further stipulations on this subject, they may do so. But the stipulation of seaworthiness, whether expressed or implied, is not so far a condition precedent, that no charter-money is due if the ship be not seaworthy; for whatever her condition, if the charterer takes possession of her, and makes use of her, he must pay for that use.<sup>2</sup> But for any detriment which he sustains by reason of her unseaworthiness, he would have a valid claim for indemnity, to be enforced by way of set-off or otherwise. And if by reason of her unseaworthiness the charterer cannot send her to sea, or send his goods in her, or make the use of her he intended, or if he is prevented from doing so in any way by the fault of the owner, he is then subject to no valid claim for the charter-money or any part of it.<sup>3</sup>

<sup>1</sup> *Goodridge v. Lord*, 10 Mass. 483, 486, per *curiam*. It was held in this case that, where the charterers covenanted to victual and man the vessel, and had paid over to the captain appointed by them the money for the wages of the crew, and he allowed the vessel to be libelled for the wages, and the owners, to prevent the sale, paid the amount due, they could maintain an action against the master for money laid out and expended, although the charterers were indebted to the master to the amount which he had retained.

<sup>2</sup> See *post*, § 6.

<sup>3</sup> The liability of the ship-owner, so far at least as it refers to the commencement of the voyage, bears a considerable resemblance to the implied warranty of seaworthiness in a policy of insurance, to which indeed it appears to be entirely assimilated in some cases by the courts. See *Putnam v. Wood*, 3 Mass. 481, 485, per *Parker, J.* In insurance, if the vessel is not seaworthy when she leaves port, the policy never attaches, and this is a perfect defence to an action against the insurer, though the vessel be lost from an entirely independent cause. But this could not be set up by a charterer whose goods were not damaged in any way by such unseaworthiness. In other words, seaworthiness is not a condition precedent. See *post*, § 6. As in insurance, the owner is liable for a latent defect. Thus, in *Backhouse v. Sneed*, 1 Murph. 173, the rudder of the ship was internally defective, although outwardly sound, and it breaking in a storm, the ship was wrecked, and some corn, which was on board, was lost. The ship-owner was held liable. See also *Dupont de Nemours v. Vance*, 19 How. 162, 167. And if the shipper inspect the vessel before putting his goods on board, the owner of the vessel will not be therefore exempt from liability for a loss occasioned by the unseaworthiness. *Lengsfeld v. Jones*, 11 La. Ann. 624. In the English case of *Christie v. Trott*, 22 Law T. 101, 25 Eng. L. & Eq. 262, the plaintiff shipped a cargo of haricot beans on board the defendants' vessel, which was then lying in dock, for carriage and delivery at another port. Before sailing, it came on to blow a gale; the vessel started a plank, the water entered, and the beans were damaged.

It is usual for the master to sign and give bills of lading in like manner as if there were no charter-party; but nevertheless as far

There was no direct evidence how the strain on the vessel was occasioned, whether by pressure of the adjoining vessels in dock, or by coming into contact with a mooring chain. The only damage done to the vessel was the starting of a plank which was sound. The repairs cost only five shillings. The jury found the vessel to be unseaworthy. On motion for a new trial, it was held that a vessel which starts a plank in dock is not a seaworthy vessel, as she ought to be equal to all the strain to which, with other ships, she might be subjected there. See also *Putnam v. Wood*, 3 Mass. 481; *The Bark Gentleman*, Olcott, Adm. 110, 1 Blatchf. C. C. 196; *Whitall v. Brig Wm. Henry*, 4 La. 223; *Harrington v. Lyles*, 2 Nott & M'C. 88; *Pothier, Charte-Partie*, 30; *Ord. de la Mar. liv. 3, tit. 3, Du Fret. art. 12*; *Valin, Comm. id.* In *Sherwood v. Ruggles*, 2 Sandf. 55, the court were requested to charge that, from the vessel's leaking two hours after she sailed, she was presumed to be unseaworthy, unless an adequate cause of the leak should be shown. This instruction was given, and the jury were also told that they might find whether such a cause had been shown. It is sufficient if the vessel be seaworthy as respects the particular voyage. *Bell v. Reed*, 4 Binn. 127; *M'Clures v. Hammond*, 1 Bay, 99. In *Towse v. Henderson*, 4 Exch. 890, to a declaration, which averred that the ship was ready to load a cargo, of which the defendant had notice, but that the defendants refused to load the cargo, which consisted of tea, on board said vessel, the defendants pleaded that the ship-owner had antimony on board as ballast, which would have injured the teas. It was proved that cargoes of tea had arrived uninjured, though antimony was on board, though such tea was viewed with suspicion. Held that there was no undertaking on the part of a ship-owner, that his vessel, if really fit, should be free from suspicion of unfitness to receive a cargo on board. If the chartered vessel is disabled while taking in her cargo, she must be repaired within a reasonable time, for, if not, the charterer will be at liberty to put an end to the contract. *Purvis v. Tunno*, 1 Brev. 260. In *Putnam v. Wood*, 3 Mass. 481, *Parker, J.*, decided that the owner of a ship carrying goods on freight on a circuitous voyage is bound to put her in repair at every port where she may be, and must answer to the freighter for any damage arising to his goods for want of such repairs. So held also in a recent case in England. *Worms v. Storey*, 11 Exch. 427, 33 Eng. L. & Eq. 400. The declaration averred that at the commencement of the voyage the vessel was unseaworthy, and also after the voyage commenced the ship was greatly damaged, and the owner had notice, but did not repair, though the vessel was in a place where repairs could have been had and that the vessel proceeded on her voyage, but was unable to meet the perils of the seas as she would otherwise have done, in consequence of which the goods of the plaintiff, the charterer, were thrown overboard. Plea that at the commencement of the voyage the vessel was tight, staunch, and strong, and every way fitted for the same, and seaworthy. On demurrer it was held that the plea was insufficient. *Parke, B.*, said: "It is contended that the owner is discharged of all liability as to unseaworthiness if the vessel was seaworthy at the time of the commencement of the voyage; but the plaintiff says no, the defendant is bound to repair if he has the opportunity, or at all events that the vessel is not to sail in an unsea-

as the charterer is concerned they are little more than evidence of the delivery and receipt and shipping of the merchandise, for the charter-party is the controlling contract as to all the terms or provisions which it expresses.<sup>1</sup> The master could not be required to sign bills promising to carry and deliver the goods for less freight than had been stipulated; and if he signed such bills, and the goods were shipped by the charterer, they would not give the charterer, or any person shipping goods with a knowledge of the charter-party, any defence against the owner's claims under the charter-party.<sup>2</sup> It has been decided in England, that where a master signs

worthy state; and I think that is the correct view of his duty, and that in such a case the captain must either repair or stop." That a charterer in this country will be allowed, in an action brought against him for the stipulated price, to offset any damages, which he may have received through the fault of the ship-owner or his agent, see p. 206, note 2. That it is too late to dispute a claim for freight on account of damage to the goods, after they have been received by the consignee without objection, see *Marcy v. Warner*, 17 La. Ann. 34.

<sup>1</sup> *Perkins v. Hill*, 1 Sprague, 123, 2 Woodb. & M. 158; *Lamb v. Parkman*, 1 Sprague, 343, per *Sprague, J.*

<sup>2</sup> *The Salem's Cargo*, 1 Sprague, 389. In *Faith v. East India Co.* 4 B. & Ald. 630, freight was to be paid by the charter-party in part on the ship's clearing, and the residue, half in cash, and half in approved bills upon the delivery of the homeward cargo. The captain was appointed by the owner and instructed to sign all bills of lading, "freight payable as per charter-party." The ship was consigned to C. & Co. in Calcutta, by whom she was put up as a general ship. Several merchants shipped in her, and C. & Co. took freight bills containing the clause "freight payable sixty days after delivery of the cargo." The captain then signed bills of lading for the goods with the clause "freight payable agreeable to freight bill." These bills were made payable to B. & Co. to whom the charterer was indebted for advances on the outward cargo. B. & Co. knew of the charter-party. It was held, that the owner of the ship had a lien on their goods to the extent of the homeward freight; but that on the goods of the sub-freighters who had no knowledge of the charter-party, a lien existed only for the freight due as per bills of lading. In *Gracie v. Palmer*, 8 Wheat. 605, overruling the same case *nom. Palmer v. Gracie*, 4 Wash. C. C. 110, the vessel was chartered, but the possession and control of it remained in the general owners. The charterer put the vessel up as a general ship, with notice of its being chartered. Goods were shipped by Palmer upon the following stipulations: that the charterers should draw bills in his favor, and that the goods should be consigned to his correspondents, to whom they should be delivered freight free, in pledge for the payment of the charterers' bills. By the bills of lading the goods were described as shipped on the account and risk of the charterer, and to be delivered to Messrs. Willings, the correspondents of Palmer, "freight for the said goods having been settled here." It was held, that the owner had a lien on the goods for

bills of lading at a far lower rate than that agreed upon in the charter-party, an indorsee of the bill of lading for value, having himself no notice or knowledge of the terms of the charter-party, is entitled to receive the goods on the terms stated in the bill of lading; and the ship has no lien on the goods for anything more.<sup>1</sup>

the whole freight due, on the ground that the goods were laden on board as the property of the charterer. The court said: "The question is not, how far his contract may exempt the goods of another from freight, but how far he may incumber his own goods with a lien which shall ride over, or supersede their general liability for freight." The language of the court would also show, that the shipper, if he knew of the charter-party, was bound to inquire what its provisions were. The point was also urged that there could be no lien for freight, because as the goods were to be carried freight free no freight could be due, but the court said that if the case of *Faith v. East India Co.* was followed out, this objection would probably be of no avail, as that case proceeded on the ground that the ship-owner was not bound to deliver the goods until his freight was paid, and, therefore, it would seem to be immaterial whether it had been previously paid to the charterer or to any other person not authorized to receive it on account of the owner. And the court held that the point did not arise, because the bill of lading did not state that the goods were to be carried free of freight, but merely said, "freight having been settled here." In *Gledstanes v. Allen*, 12 C. B. 202, 22 Eng. L. & Eq. 382, the charter-party stipulated that the goods should be delivered on payment of freight, "a lump sum of £2,800 in full of all charges." At the end of it was the following clause: "The captain to sign bills of lading at any rate of freight, without prejudice to this charter. In the event of a less freight the bills of lading of part of the cargo to be filled up for loss, if any." The charterers shipped goods as their own, for which the captain signed bills of lading at a specified rate of freight. The goods so shipped were consigned for sale to the plaintiffs, the correspondents of the charterers in London, who were under a general engagement to honor bills drawn on them by the charterers upon the faith of consignments to be made to meet them, and who were largely in advance at the time of the shipment in question. The court held, that if the agreement relative to the power of the captain to sign bills of lading had any meaning, it was intended to apply solely to the case of goods belonging to third parties, and that the master had no power to sign bills for the charterers' goods at less rates than stipulated in the charter-party. But see *Gilkison v. Middleton*, 2 C. B. N. s. 134, 40 Eng. L. & Eq. 295.

<sup>1</sup> *Foster v. Colby*, 3 H. & N. 705. In this case *Pollock*, C. B., said: "I prefer to rest my judgment on this ground, that a *bonâ fide* indorsee for value of the bill of lading, having no knowledge or notice of the charter-party, or that the cargo was subject to lien for any freight except that mentioned in the bill of lading, and not acting collusively, is entitled to the goods on payment of the freight stipulated for in the bill of lading, and is not affected by the greater liability of the indorsee, supposing such liability to exist. It is impossible to distinguish the case from *Gilkison v. Middleton*, 2 C. B. N. s. 134." In this case, though the current rate

but that on the other goods of the sub-freighters who had no knowledge of the charter-party, a lien existed only for the freight due as per bills of lading.

It may be said in general, that the rules in respect to the carriage of cargo, — as that freight is payable only for goods carried and delivered, that the ship has a lien on the cargo for freight earned, and that freight is due *pro rata* when the goods are accepted at an intermediate port, are all of them equally applicable to carriage by charter-party as by bill of lading.<sup>1</sup>

Whether the charterer hires only the burden, or the carrying capacity of the ship, or hires the whole ship and takes her into his hands, the amount which he is to pay does not depend altogether upon the quantity of goods which he sends. For if he hires the whole burden or the whole ship by any words which express or imply that he is to fill her and pay for all she carries, then if he fails to provide a full cargo, he is liable as if a whole cargo had been provided.<sup>2</sup> And it is no answer to such an action that the government refused a permit to load a full cargo if the charterer agreed to obtain it.<sup>3</sup>

of freight was £5 10s. a ton, the master signed bills of lading for 5s. a ton. *Pollock*, C. B., said: "It is said that, from the small amount of freight mentioned in the bill of lading, the indorsee must have had notice that the sum named was not the true freight for the goods; that suspicion should have been excited, and that it ought to have been assumed that the parties did not mean what they said. But in a court of law we must presume that persons who sign mercantile documents mean what they say." The reason for the low rate of freight was that the consignees of the goods, who were the agents of the charterers, had made advances on the goods. This case does not, however, present the question how far the master of a vessel sailing under a common charter-party, has the right to bind the owners by signing for less than the usual freight; because the charter-party provided "The master to sign the bills of lading at any rate of freight required without prejudice to this charter-party." See also *Fry v. Bank of India*, Law Rep. 1 C. P. 689; *Pearson v. Göschén*, 17 C. B. N. S. 352; *Kern v. Deslandes*, 10 id. 205; *The Norway*, Brow. & L. Adm. 226; *Russell v. Niemann*, 17 C. B. N. S. 163.

<sup>1</sup> See *ante*, p. 174, note 2; p. 204; p. 240, note 2; *Sturgis v. Gairdner*, 2 Brev. 233, in which case it was held, that freight *pro rata* could not be recovered in an action of covenant on a charter-party, but that *assumpsit* was the proper remedy.

<sup>2</sup> *Beawes*, *Lex Mercatoria*, 118; *Thomas v. Clarke*, 2 Stark. 450; *Thompson v. Inglis*, 3 Camp. 428; *Duffie v. Hayes*, 15 Johns. 327; *Klein v. Catara*, 2 Gallia. 61, 66; *The Brig Cynthia*, 1 Pet. Adm. 203, 207.

<sup>3</sup> *Kirk v. Gibbs*, 1 H. & N. 810, 40 Eng. L. & Eq. 438. The charter-party in this



Where a charterer stipulates to ship a full cargo, consisting of heavy and light goods, he is not obliged to load enough of the heavy goods to keep the ship in proper trim, but the ship-owner is bound to provide sufficient ballast.<sup>1</sup> If the charterer stipulates to furnish a sufficient quantity of goods to fill the vessel, and to load her to a fair and reasonable draught, with enough of a certain kind, or its equivalent, for ballast, the charterer is not bound to provide such goods as the master demands, but if the latter can, with the goods furnished, stow the vessel in such a way as to fill and trim her properly, the obligation of the charterer is performed.<sup>2</sup> But if the charterer stipulates to furnish sufficient funds to fill a certain proportion of the vessel with any or all of certain kinds of merchandise, the master is not bound to apportion the funds among the articles more or less bulky so as to fill the ship with the funds furnished.<sup>3</sup> If the shipper has the option to load the vessel entirely with goods at a higher rate, or partly with such goods, and partly with those of a lesser rate; but the latter, if laden at all, should be laden first; it has been held, that if he begins to load with the goods at a higher rate he cannot use the others.<sup>4</sup> The ship is bound to load the goods with due skill and care; and the owner is always responsible for injury from improper stowage.<sup>5</sup> If the charter-party requires the hirer to fill the ship, or load her with a case did not contain any clause relative to the restraint of princes. In *Hills v. Sughrue*, 15 M. & W. 253, where the ship-owner agreed to load a full cargo of guano, it was held to be no excuse for a breach of the agreement that no guano could be obtained, although the charter-party contained a clause that the charterers were to ship bags and other materials requisite for loading the ship, and to supply the stores for the vessel, at cash prices for the voyage, and to deduct the amount from the balance of freight, but in the event of the vessel's being lost, or any other unforeseen causes preventing the completion of the charter-party, the owner agreed to pay the charterers the amount of their disbursements for such stores.

<sup>1</sup> *Moorson v. Page*, 4 Camp. 103. And where the charterer stipulated that one hundred tons of rice or sugar should be loaded first, in order to ballast the vessel, it was held, that after loading the one hundred tons, he was at liberty to complete the cargo with light goods, and if more ballast was needed, the owner was bound to supply it. *Irving v. Clegg*, 1 Bing. N. C. 53.

<sup>2</sup> *Rich v. Parrott*, 1 Sprague, 358, affirmed 1 Clifford, C. C. 55.

<sup>3</sup> *Brown v. Putnam*, 2 Met. 275.

<sup>4</sup> *Benson v. Schneider*, 7 Taunt. 272.

<sup>5</sup> See, as an interesting case on this point, *Sandeman v. Scurr*, Law Rep. 2 Q. B. 86.

full cargo, or to her utmost capacity, or if any such language is used, he will not be obliged to put in, and if he offers, the owner or master will not be obliged to receive, more cargo than she can safely carry, although all the space is not filled.<sup>1</sup> This question is generally one to be determined by experts on all the facts in the case.<sup>2</sup> And the opinion of the master on this point is entitled to great weight, and it has been held that it is controllable only by decisive evidence of a mistake on his part.<sup>3</sup>

A vessel must be loaded according to the usages of the trade. Where, therefore, a usage was proved to compress bales of cotton wool by machinery, it was held that a stipulation to load a full cargo was not complied with by filling the ship with uncompressed bales.<sup>4</sup>

In a recent English case, where the charter-party provided that "the charterer's stevedore is to be employed by the ship," and the failure of the charterer to provide a stevedore was urged as a defence to an action against the ship-owner for defect in lading, it was held that this provision gave the charterer a privilege, but did not lay upon him any obligation; and the duties of the ship-owner were unaffected by it.<sup>5</sup>

In one case where, among other goods mentioned, freight was to be paid at a certain rate per quarter of four hundred and eighty pounds for Indian corn *or other grain*, it was held that this latter phrase included only such grain as averaged four hundred and eighty pounds to the quarter.<sup>6</sup> If various articles are specified in the charter-party, which may be taken, at different rates of freight,

<sup>1</sup> *Weston v. Minot*, 3 Woodb. & M. 436. See also *Wheeler v. Curtis*, 11 Wend. 653.

<sup>2</sup> *Ogden v. Parsons*, 23 How. 167.

<sup>3</sup> *Weston v. Foster*, 2 Curtis, C. C. 119.

<sup>4</sup> *Benson v. Schneider*, 7 Taunt. 272. So where a shipper agreed to load a full and complete cargo of sugar, molasses, and other lawful produce, it was held, by the Court of Exchequer, that evidence was admissible to prove that by the custom of merchants at the port of lading, a full and complete cargo of sugar and molasses in puncheons and hogsheads, was a compliance with the contract, though the same quantity of sugar, if packed in tierces, would not constitute a full cargo. *Cuthbert v. Cumming*, 10 Exch. 809, 29 Eng. L. & Eq. 456, s. c. affirmed in the Exchequer Chamber, 11 Exch. 405, 30 Eng. L. & Eq. 604.

<sup>5</sup> *Anglo African Co. v. Lamzed*, Law Rep. 1 C. P. 226. See another case on the construction of a charter-party. *Tamvaco v. Simpson*, Law Rep. 1 C. P. 363.

<sup>6</sup> *Warren v. Peabody*, 8 C. B. 800.

and the contract also provides that "other legal merchandise" may be taken, but no rate of freight is specified, such goods are not to be taken gratuitously, nor upon a *quantum meruit*, but an average freight of the articles specified is to be taken.<sup>1</sup>

It is sometimes provided that the charterers shall pay in addition to the freight stipulated for, a further sum, if freights on the voyage in question shall advance. In such a case the ship-owner may prove this fact by parol, and may also show in the same way that the rate of freight did in fact advance, although the advance was ostensibly paid for another purpose.<sup>2</sup>

The charterer has a right, unless there be an express stipulation to the contrary, to carry the goods of other people for whatever he can get; for more than he pays, and so make his profit, or for less, and so save in part what he must pay.<sup>3</sup> But he must pay for all the space and burden which he hires; and that part of the freight-money which is paid for the space or burden that is unoccupied, is called dead freight. There is, however, no lien for dead freight.<sup>4</sup>

<sup>1</sup> *Thomas v. Clarke*, 2 Stark. 450; *Capper v. Forster*, 3 Bing. N. C. 938, per *Tindal*, C. J.; *Cockburn v. Alexander*, 6 C. B. 791; *Warren v. Peabody*, 8 C. B. 800.

<sup>2</sup> *Barreda v. Silsbee*, 21 How. 146. In *Gether v. Capper*, 15 C. B. 696, 29 Eng. L. & Eq. 242, the declaration stated that the plaintiff was to receive the highest freight which he could prove to have been paid for ships on the same passage by water, when the said vessel passed *Elsinore* inwards, &c. This was construed to mean on the same voyage, and not a voyage on the same seas and waters; and as the plaintiff could not prove that a higher rate had been paid on that voyage, the defendant had a verdict. Affirmed: *Gether v. Capper*, 18 C. B. 866, 36 Eng. L. & Eq. 381.

<sup>3</sup> By the French Ordinance it is provided that the charterer shall not underlet at an advance price. Liv. 3, tit. Fret, art. 27. In England it has been held that it may be done; and that where the captain signed bills of lading to sub-charterers, whereby they promised to pay six shillings a quarter freight, and the owner, by his contract with the original charterer, was only entitled to four shillings and sixpence, this was all he could recover in an action against the sub-charterers, on the bills of lading. *Michenson v. Begbie*, 6 Bing. 190.

<sup>4</sup> See *ante*, p. 179, n. *Kerford v. Mondel*, 5 H. & N. 931. By the charter-party it was provided that the shipowners should have a lien for dead freight. The master might sign bills of lading as tendered without prejudice to the charter-party; and it was agreed that there should be a lien for dead freight on the goods to be laden on board. Bills of lading were given for goods deliverable "on payment of freight and carriage as agreed." Held, nevertheless, that there was no lien for dead freight.

The agreement to pay may be so much for the whole ship in a gross sum, or so much for her at such a rate per ton (in which case it has been held that nothing is payable for anything less than a ton without an express provision),<sup>1</sup> or so much by the bale, box, barrel, or parcel; in which latter case it is usual to agree that not less than so many shall be sent.<sup>2</sup> If the agreement be so much a ton, it should be stated whether by this is meant so much for each ton of legal custom-house measurement, or so much for each ton of her actual capacity. These sometimes differ very widely; and where there is no express provision on this point, and the intention of the parties cannot be gathered from any words used by them in connection with the *res gestæ*, or such facts as entered into and were a part of the negotiation and were admissible as evidence, we should say that the presumption of law would be in favor of the legal measurement. But commercial usage, well established and clearly proved, would undoubtedly have a controlling influence in the decision of this question.

If the charterer pays so much by the ton, and a part of his cargo is lost by a peril of the sea, and is therefore never carried, for this part he should pay no freight.<sup>3</sup> But if he pays a gross sum for the whole vessel, or if the language used implies this distinctly, then it would seem that the payment is no more affected by the quantity actually carried, than the hire of a house would be by the use or non-use made of it. It may be difficult to determine the intention of the parties, or the purport of the contract, in this respect. But while there would seem to be no authority for apportioning the freight in the case last supposed above, yet if all the cargo was lost, and none delivered, it would be difficult to maintain any claim for freight-money, unless the contract was distinctly a hiring of the ship by the charterer to use or not use as he pleased while he had possession of her, and not a contract by which the owner engaged to carry goods.<sup>4</sup>

<sup>1</sup> *Rea v. Burnis*, 2 Lev. 124.

<sup>2</sup> If a ship is chartered by the barrel or bale, freight is payable for the quantity only that is actually conveyed. *Roccus*, note, 73, 75.

<sup>3</sup> See *ante*, p. 204, and *Roccus*, note, 72, 75.

<sup>4</sup> We have seen, *ante*, p. 205, that, in the case of a general ship, freight is sometimes due for the goods delivered. But, when a ship is chartered for a specific sum for the voyage, and only a part of the cargo is delivered, the rest being lost by a peril of the sea, it has been held, both in England and in this country,

The charterer may take in the goods of others; but as he is bound to pay for the whole burden, he has the control of the whole, and the master has no right, under any circumstances, to take in the goods of other parties against the charterer's will. But, as the policy of the law merchant makes the master the agent from necessity of all who are interested in the ship or her cargo, so far as any emergency may create this necessity, and as this policy also favors the full use and employment of a ship as a public good, when a master finds that the charterer has not goods enough to fill the vessel, he not only may, but, as we think, should (in the absence of prohibition), take in the goods of others, and thereby relieve the charterer of so much of his obligation, or rather provide him with the means of discharging it. But high authorities have stated that he should not do this without the consent of the charterer.<sup>1</sup> Even if the charterer or his agent should prohibit the master from filling the dead freight, if he had reasonable cause to doubt the charterer's solvency, we apprehend that he would be safe in receiving other goods, after it became certain that the charterer would not fill the ship. Indeed, it would be difficult to see what damage the charterer could sustain, or could recover, if the master filled a space he certainly could not occupy himself, but must pay for, even if he did prohibit this. If, however, the charterer was not insolvent, it might be said that he would be injured by having other goods carried to compete with his own, and that he would prefer paying his dead freight. There is, in

that in an action of covenant on the charter-party, there can be no apportionment of freight. *Bright v. Cowper*, 1 Brownl. 21, cited also by *Grose, J.*, in *Cook v. Jennings*, 7 T. R. 385; *Malynes, Lex Mercatoria*, 100. In *Post v. Robertson*, 1 Johns. 24, the question came before the Supreme Court of New York, and it was held that, in an action of covenant, freight could not be recovered unless all the goods had been delivered. A majority of the court were also of the opinion that if a portion of the goods had been received, an action of *assumpsit* would lie, to recover freight *pro rata* on the implied promise. See also *Sturges v. Gairdner*, 2 Brev. 293. The question was raised and discussed in *Weston v. Minot*, 3 Woodb. & M. 486, but not decided. Mr. Justice *Woodbury* suggested that, to avoid difficulty, the proviso, that freight should be paid *pro rata*, though a full cargo should not, by accident, or other unblamable cause, be delivered, should be inserted in the contract of affreightment. See also, as to contracts generally, *Roberts v. Havelock*, 3 B. & Ad. 406; *Sinclair v. Bowles*, 9 B. & C. 92.

<sup>1</sup> Pothier, *Charte-Partie*, n. 20; L'Ord. de la Mar. liv. 3, tit. 3, Fret, art. 2.

fact, little authority on this subject, and no controlling usage that we are aware of.<sup>1</sup> But, however this may be, it is the duty of the master, and the charterer has the right to require it of him, to obtain another cargo, if the charterer wholly refuses to employ the ship, and the freight thus earned is to be deducted from the sum claimed for the breach of the contract.<sup>2</sup> But the burden of proof is on the charterer to show that another cargo could have been obtained.<sup>3</sup> And the refusal of the captain to take other goods before the contract was broken by the charterer, will not make the captain responsible for the freight which might thus have been

<sup>1</sup> See Abbott on Shipping, 249.

<sup>2</sup> *Heckscher v. McCrea*, 24 Wend. 304; *Ashburner v. Balchen*, 3 Seld. 262. Mr. Justice Cowen, in *Shannon v. Comstock*, 21 Wend. 457, states the law as follows: "If the party entitled to the benefit of the contract can protect himself from the loss arising from a breach at a reasonable expense, or with reasonable exertions, he fails in his social duty if he omit to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable." See also *Wilson v. Hicks*, Exch. 1857, 40 Eng. L. & Eq. 511. But if the charterer agrees to furnish a cargo at a certain rate of freight per hundred weight, it has been held that the master is not obliged to take the same cargo at a less rate and look to the charterer for the difference. *Hyde v. Willis*, 3 Camp. 202. In *Crabtree v. Clark*, 1 Sprague, 217, an action was brought to recover damages for breach of a charter-party. The libellant agreed to receive a cargo of salt from the respondents and bring it to Boston. The respondents stipulated to furnish the salt at Buenos Ayres, and to pay freight upon it at the rate of fourteen cents a bushel. The charter-party also contained the following clause: "It is further understood and agreed that the master is to use the vessel's funds in payment for salt, which he is to purchase at the lowest cash price, and on the vessel's arrival at Boston the charterers are to pay the master or his agent the invoice cost of salt, export duty if any, and insurance on amount invested in purchase of salt from Buenos Ayres to Boston, and Boston wharfage, all in addition to the freight." The vessel went to Buenos Ayres with funds to buy a cargo, but there was no salt there, and after remaining twenty-four hours, she left and returned to Boston in ballast. Held, that the respondents had broken the contract by failing to furnish the salt; that the libellant was not bound to wait longer than he did, unless there was ground to expect that a cargo might be obtained by further delay; that if any other cargo could have been obtained at Buenos Ayres, to be brought to Boston as freight, the libellant would have been bound to have taken it, that the proceeds might diminish the damages; but that he was not bound to purchase a cargo on his own risk or to go to Curacao, or to any other port in pursuit of business, and thus by a deviation endanger his insurance. This case was affirmed on appeal. *Clark v. Crabtree*, 2 Curtis, C. C. 87. But see *Bailey v. Damon*, 3 Gray, 92.

<sup>3</sup> *Dean v. Ritter*, 18 Misso. 182.

earned, if the contract was subsequently broken.<sup>1</sup> But the captain, after the charterer has refused to load a cargo, should proceed at once to obtain another one, and not wait till the time expires during which the charterer had a right by the charter-party to put on board goods.<sup>2</sup> The cargo obtained by the captain after a refusal of the charterer to load, will not be the property of the latter.<sup>3</sup>

It may be a question who owns the freight thus earned by the

<sup>1</sup> *Harries v. Edmonds*, 1 Car. & K. 686.

<sup>2</sup> *Bright v. Page*, cited 3 B. & P. 295, note; *Heckscher v. McCrea*, 24 Wend. 304, 309. But in *Avery v. Bowden*, 5 Ellis & B. 714, 33 Eng. L. & Eq. 133, affirmed 6 Ellis & B. 953, 38 Eng. L. & Eq. 130, where the charterer told the master he had no cargo and he had better go away, it was held that this was not such a refusal to load as would entitle the ship-owner to sue for breach of the contract. And in *Barrick v. Buba*, 2 C. B. n. s. 563, the same rule was applied to a case where the agent of the charterer said he had ceded the charter-party with all its rights and obligations to a third party, and the master was requested to look to him for a cargo. In both of these cases the contract was put an end to by war before the lay days had expired. In *Matthews v. Lowther*, 5 Exch. 574, an action was brought by a charterer against the owner of a vessel for breach of the charter-party. By this instrument it was stipulated that the ship should proceed to two ports in Sicily, or usual place of loading, and after delivery of her outward cargo, load from the factors of the plaintiff there a full cargo, and thence proceed to Bristol, and that the vessel should receive her orders before leaving Messina. The declaration, after averments that the ship arrived at Messina, and a general allegation of performance by the plaintiff, assigned as a breach, that the defendant, within a reasonable time after the delivery of her outward cargo, and before the plaintiff could have given orders for the ship to proceed to the said ports, made a contract with a third party for the conveyance of goods from Messina, and therewith and within such reasonable time as aforesaid, and before such reasonable time had elapsed, loaded his ship, and afterwards proceeded to London without taking on board the cargo agreed to be taken from the plaintiff, and thereby deprived him of the power of fulfilling the charter-party, although within such reasonable time he had provided merchandise, and was ready to load it, and although he was ready and willing to have given orders to proceed to two ports, and to have there loaded a full cargo. On demurrer the declaration was held bad, as it did not show that the vessel had sailed before the lapse of a reasonable time for the performance by the plaintiffs of their part of the contract, and so did not show that the defendant had incapacitated himself from performing his part of the contract; and that it ought to have contained an averment that the plaintiff had performed his part by giving orders, etc., and by tendering a cargo within such reasonable time. *Alderson, B.*, said: "The defendant did not, by loading his vessel with a third party's goods, incapacitate himself from performing the original charter-party, for he might have unloaded the vessel, and have been ready within a reasonable time to perform his engagement with the plaintiffs."

<sup>3</sup> *Lidgett v. Williams*, 4 Hare, 456.

master's act, if it be more than the stipulated freight. We apprehend it ought to be determined by the further question, whether the charterer had, by word or act, renounced the right of filling the ship or not. If certainly not, the presumption of law should be that the master in filling the ship acted as his agent, and that the profit thence arising should be his. If, however, he had as it were abandoned the empty space to the owner, then it might be held that the master acted as the owner's agent, and filled it on his account, releasing the charterer from his obligation to pay, and giving the freight earned to the owner.<sup>1</sup> And if there is a special agreement made that in case of failure to load the return cargo, the freighters will pay a gross sum less than the amount of freight per ton; the master, on the failure to load, will be entitled to the gross sum and also to the freight which the ship may earn by taking on board another cargo.<sup>2</sup> In a recent English case the defendants chartered two vessels to take full cargoes from a certain foreign port to London, but on account of a loss by fire they were

<sup>1</sup> *Kleine v. Catara*, 2 Gallis. 61. In this case a part of a ship only was chartered by the plaintiff for a voyage from Havana to the United States. Freight was to be paid at the rate of one dollar per quintal of one hundred and twelve pounds net weight on delivery of the cargo to the United States. The owner of the vessel was to send out wine on the outward voyage, on which the plaintiff agreed to advance two thirds of its value, if it could not be sold on its arrival at Havana. The plaintiff wrote to his supposed agent in Cuba to attend to all the stipulations in the charter-party. This he refused to do, but loaded a cargo on the account of, and consigned to, strangers to the charter-party. With this cargo the ship sailed, was captured and released, and finally arrived in Boston. The freight of this cargo amounted to about \$5,000 more than that stipulated for in the charter-party. The plaintiff thereupon brought this action to recover the excess. The court held that the contract was put an end to by the failure of the plaintiff to perform his part of the agreement, and that what the captain did was as the agent of the owner, and for his benefit, more especially as the charterer was not owner for the voyage.

<sup>2</sup> *Bell v. Puller*, 2 Taunt. 285. See also *Puller v. Staniforth*, 11 East, 232; *Puller v. Halliday*, 12 East, 494. In *Brown v. Putnam*, 2 Met. 275, the defendants agreed with the plaintiffs, the owners of a vessel, to furnish funds to fill eleven-twelfths on a joint adventure. The funds not being sufficient, the master obtained goods to fill the deficiency from the consignee, and the defendants received the freight. Held, that the plaintiffs were entitled to it, but as the amount was greater than would have been earned at the current rate, and was allowed by the consignee at such rate, instead of a return commission, which he would have allowed, and which by agreement would have belonged to the defendants, they were entitled to deduct it from the freight.



unable to provide the goods. The charter-party was then cancelled by agreement, the defendants guaranteeing to each vessel £900 gross freight home. The homeward cargoes shipped under the substituted contracts fell short of the guaranteed sum for each vessel. One vessel was lost on the way; but the court held that the owners were entitled to recover the sum guaranteed on each vessel notwithstanding one was lost.<sup>1</sup> If the ship-owner takes goods on board with the consent of the charterer in that part of the vessel reserved for the use of the officers and crew, he can maintain an action against a shipper for the freight thereof.<sup>2</sup> And it seems that he may take on board any goods, unless forbidden by the charter-party, which will not enter into competition with the goods of the charterer.<sup>3</sup>

Where a vessel was chartered for a voyage "from New York to Melbourne, Australia, thence to Manilla, and back to Boston, or from Melbourne to Calcutta, and back to Boston, including the cabin for passengers for the outward voyage only," the outward voyage was held to terminate at Melbourne.<sup>4</sup>

The charterer of a vessel who has been subjected to expense in getting her off from and over a gas-pipe, which unlawfully obstructed a river, the vessel being navigated with due care, may maintain an action against those who laid the gas-pipe to recover for such expense, but not for any delay in his business or other consequential damages.<sup>5</sup>

<sup>1</sup> Carr v. Wallachian Petroleum Co. Law Rep. 1 C. P. 636, Law Rep. 2 C. P. 468.

<sup>2</sup> In Neill v. Ridley, 9 Exch. 677, 28 Eng. L. & Eq. 436, by the charter-party it was agreed that (the cabin and state-rooms, and sufficient room for cables, ship's stores, etc. throughout the charter-party being excepted) the vessel should take on board from the charterers (who were to have the full reach of the vessel's hold from bulkhead to bulkhead, including the half deck) a full and complete cargo, etc. That such goods only as the charterers might direct should be received on board the said vessel; and that no goods were to be received in the cabin, or any part of the vessel, without the consent of the charterers. Held, that under this charter-party the deck remained in the possession of the owners, and they could maintain an action for freight against a person who shipped cattle on board thereof, with the consent of the charterers, the shipper making a verbal promise to the master to pay the general owners.

<sup>3</sup> Thus, in Towse v. Henderson, 4 Exch. 890, it was held, that he might take merchandise for freight in the place of ballast, provided it did not occupy more space than ordinary ballast.

<sup>4</sup> Rennell v. Kimball, 5 Allen, 356.

<sup>5</sup> Benson v. Malden Gas Light Co. 6 Allen, 149.

A charterer, who puts up the vessel as a general ship, is liable to the owner of the ship for damages which the latter has to pay shippers for injury to their goods, caused by goods put on board by the charterer, although the charterer did not know that his goods would do any damage.<sup>1</sup>

### SECTION III.

#### OF THE LIEN OF A CHARTERED SHIP ON HER CARGO FOR THE FREIGHT.

The ship has a lien on the goods she carries for their freight; such, we have repeatedly said, is the general rule; and it is also a favored rule, the policy of the law merchant binding the ship to the goods, and the goods to the ship, for their mutual benefit, and for the general advantage of commerce.<sup>2</sup> Nevertheless it has been made a question, whether, if an owner let his ship to hire by charter-party, he did not thereby give up his possession so far, that he could have no lien on the cargo for his freight. Much confusion has arisen in the English courts, which have extended in some measure, at least, to our own.<sup>3</sup>

This confusion and difficulty have arisen from the case of *Hutton v. Bragg*,<sup>4</sup> which was wrongly decided, and from the application of the common-law rule that possession is necessary to lien. Abbott (Lord Tenterden), even, in his work on shipping,<sup>5</sup> says, "where there is no possession, actual or constructive, there can be no lien." But this rule is applicable in admiralty, and as we think in commercial law, only so far as it rests on reasonable grounds. We have already had occasion to speak of it in considering the question whether there is a lien for freight when a bill of lading provides that the freight is to be paid *after* delivery.<sup>6</sup> We consider that in this country this question in relation to charter-parties is, for all practical purposes, settled, and settled in conformity with reason and justice.

<sup>1</sup> *Pierce v. Winsor*, 2 Sprague, 35.

<sup>2</sup> See *ante*, p. 173, note 1; p. 174, note 2.

<sup>3</sup> See *ante*, p. 278.

<sup>4</sup> 7 Taunt. 14. See also p. 278, n. 2.

<sup>5</sup> Abbott on Shipping, p. 288.

<sup>6</sup> See *ante*, p. 174, n. 2.

The rule we take to be this. If the charterer takes possession of the ship, puts on board a master and crew and pays them, and provisions the vessel, he does not bargain for the carriage of his goods, but hires the ship and takes her to himself, and becomes the *quasi* owner of her, as long as he thus holds her.<sup>1</sup> The general owner now carries no goods for any one; and it is nothing to him whether his ship carries goods or not; and if she carries them it is not *as* his ship, and he has no lien on the goods for his freight,<sup>2</sup> and, as we have seen,<sup>3</sup> incurs no liability if they are lost, and this although the charterer is an infant, because the contract between the owner and charterer is in such a case voidable only and not void.<sup>4</sup> Nor is the owner of a chartered vessel liable for wharfage.<sup>5</sup>

If a charterer chooses to carry goods for others, he, as owner for the time, has a lien on these goods for the freights payable to him.<sup>6</sup> But if the original owner is in possession, his bargain is to carry the goods of the charterer for the money to be paid him; he has, by his servant the master, perpetual possession of the ship, and so of the cargo laden on board of her; and he may retain this possession by his lien on the cargo for his freight, and payment to the charterer by a shipper who puts goods on board will be no defence to an action by the owner.<sup>7</sup> But payment to the owner will, in such a case, be a good defence to an action against that shipper by the charterer.<sup>8</sup>

If, however, the charterer is in possession of the ship, then payment of freight by the shipper to the charterer would discharge the lien of the owner, certainly if it were paid without notice of the claim and lien of the owner; and we incline to think it would have

<sup>1</sup> *Vallejo v. Wheeler*, 1 Cowp. 143; *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 39; *Lander v. Clark*, 1 Hall, 355; *Pickman v. Woods*, 6 Pick. 248; *Clarkson v. Edes*, 4 Cow. 470; *Drinkwater v. Brig Spartan*, Ware, 149; *The Phebe*, Ware, 263, 265; *Belcher v. Capper*, 4 Man. & G. 502.

<sup>2</sup> *Drinkwater v. Brig Spartan*, Ware, 149; *Marquand v. Banner*, 6 Ellis & B. 232, 36 Eng. L. & Eq. 136.

<sup>3</sup> *Ante*, page 125, note 2.

<sup>4</sup> *Thompson v. Hamilton*, 12 Pick. 425.

<sup>5</sup> *Philadelphia v. Naglee*, 1 Ashm. 37.

<sup>6</sup> *Lander v. Clark*, 1 Hall, 355.

<sup>7</sup> *Clarkson v. Edes*, 4 Cow. 470; *Ruggles v. Bucknor*, 1 Paine, C. C. 358. See also cases *ante*, p. 287, note 2.

<sup>8</sup> *Holmes v. Pavenstedt*, 5 Sandf. 97.

this effect even with notice, because the owner has authorized by such a charter-party other persons to contract in this way with the charterer.<sup>1</sup> And it is quite clear and well settled, that the owner's lien extends only to the amount actually due from the shipper to the charterer by their contract, although this be less than the amount due from the charterer to the owner.<sup>2</sup> And if a vessel is

<sup>1</sup> If the charterer is in possession, and freight is paid to the master, who delivers it to the owner, the master will be liable in an action brought against him by the charterer, for money had and received. *Lander v. Clark*, 1 Hall, 355. See also *Shaw v. Thompson*, Olcott, Adm. 144. The facts of this case were somewhat peculiar. The action was *in personam* against the respondents to recover three hundred and fifty dollars, claimed to be due for freight on goods consigned to them. The vessel was chartered to one Stearns, the owner retaining the command, on a voyage from New York to Cuba and back. On the return voyage, goods were shipped consigned to the respondents, for which the freight alleged to be due was payable. The bill of lading contained the clause that freight was payable to the consignees. On arrival, notice was given to the respondents that freight was to be paid to the master or owner. The charterer was indebted on the charter-party more than the amount of freight payable on that shipment. The respondents were willing to pay over \$258.10 to whomsoever it belonged, but claimed a right to retain \$91.90, which they alleged was due to them from the charterer. The sum of \$258.10 was subsequently, but before this action was brought, paid over to the charterer by the consent of the libellant. Held, that as to this, the owner of the vessel had no claim against the respondents, but that he could recover the \$91.90.

<sup>2</sup> We have seen, *ante*, p. 287, n. 2, that where a vessel is chartered and the master appointed by the owner, the master cannot sign bills of lading for a less amount than the freight stipulated for in the charter-party, in behalf of the charterer, or one having knowledge of the charter-party. But where the shipper acts in good faith, and has no knowledge of the charter, we apprehend it is well settled that the general owner has no lien except for the amount stated in the bill of lading. *Paul v. Birch*, 2 Atk. 621; *Faith v. East India Co.* 4 B. & Ald. 630; *The Sch. Volunteer*, 1 Sumner, 551, 573, per *Story, J.* In *Christie v. Lewis*, 2 Brod. & B. 410, the general owner claimed only the freight due on the bills of lading, and the only question was whether the ship was so let to the hirer that he had no lien. In *Mitchell v. Scaife*, 4 Camp. 298, it was held that a *bonâ fide* indorsee of a bill of lading, who took it without knowledge of the charter-party, was obliged to pay only the freight due as per bill of lading. So in *Howard v. Tucker*, 1 B. & Ad. 712, the same principle was applied in the case of an indorsee of a bill of lading which stated that the freight had been paid. See also *Gilkison v. Middleton*, 2 C. B. N. s. 134, 40 Eng. L. & Eq. 295; *Gledstanes v. Allen*, 12 C. B. 202, 22 Eng. L. & Eq. 382, *ante*, p. 288, note. In *Small v. Moates*, 9 Bing. 574, it was held that where the charter-party expressly reserved a lien on all goods laden on board, and goods were once shipped on board by the charterer, the lien of the owner attached for all the freight due under the charter-party, and

let on shares to the master, the owners cannot maintain an action for the freight;<sup>1</sup> and they are not, on the weight of authority, liable for the wages of the crew.<sup>2</sup>

We have seen that the charter-party usually provides expressly, that the owner binds the ship and freight to the performance of his part of the bargain, and the shipper binds the cargo to the ship for his performance. But, without these expressions, the law merchant creates, or implies, this mutual obligation, in every case of a contract of affreightment, whether by bill of lading or charter-party.<sup>3</sup>

that this lien would not be divested even by a sale of the goods to a third party without notice of the stipulations in the charter-party, and that if the master gave bills of lading to the vendee, and they were indorsed by him for a valuable consideration, the indorsee could not obtain possession of the goods at the end of the voyage by a tender of a reasonable freight for their carriage. The court, however, admitted the general principle that an owner has a lien on goods shipped by a third party only for the freight due on them.

<sup>1</sup> *Manter v. Holmes*, 10 Met. 402. But in *Sims v. Howard*, 40 Maine, 276, where the master sailed the vessel on shares, paying one half the pilotage and all extra expenses, the captain paying the crew and victualling the vessel, the court held that the master did not have such absolute control of the vessel as precluded the owners from suing for freight.

<sup>2</sup> In *Skolfield v. Potter, Daveis*, 392, which was an action against the owners by seamen for their wages, the defence was that the vessel was let on shares to the captain. *Ware, J.*, expressed his dissatisfaction with the modern cases so far as they hold the owners discharged where the parties furnishing supplies had no notice of the agreement at the time, and refused to extend the doctrine to the case at bar. The language of the learned judge in this case would go to the extent of holding the owners liable in all cases for the wages of seamen, but the case was decided partly on other grounds. The rule as laid down in the text is supported by *McCabe v. Doe*, 2 E. D. Smith, 64, in which case the master was a part-owner but hired by the charterers, and by *Giles v. Vigoreux*, 35 Maine, 300, where the court said: "In the case of *Skolfield v. Potter*, there was a special promise made by the owners to the plaintiff to pay the order drawn on them in his favor by the master when it was presented, and the freight earned on the cargo brought home was collected by one of the owners and retained in his hands. These facts might warrant the decision in favor of the plaintiff, although the vessel was let to the master on shares." See also *Aspinwall v. Bartlet*, 8 Mass. 483. And Mr. Justice *Curtis*, in *Webb v. Peirce*, 1 Curtis, C. C. 104, speaking of *Skolfield v. Potter*, said: "There are elements in that case upon which the decision may rest consistently with the principles upon which this case has been decided; and I do not intend to express any opinion as to a claim for wages on a general owner who has received freight earned in the voyage for which wages are claimed. See *Harding v. Souther*, 12 Cush. 307.

<sup>3</sup> See *ante*, p. 173, 174. The *Brig Casco, Daveis*, 184. It is, however, always

If, however, the parties choose to stipulate otherwise; as, that there shall be no lien; or, that the lien shall be other than it usually is, they may do so.

We have already given some consideration to the question, whether a master, who delivers the goods without insisting upon and obtaining the payment of freight, to which he is entitled, from

safer for the owner to make a special contract that he shall have a lien for the freight whatever be the provisions of the charter-party. See *Small v. Moates*, 9 Bing. 574. Whether the general clause, which is usually inserted in the charter-party, amounts to such a special contract, has been disputed. The better opinion seems to be, that it does. Lord *Tenterden*, in his *Treatise on the Law of Shipping*, p. 286, speaking of this clause, said: "The clause whereby the merchant binds the cargo, does not give to the owner a lien on the cargo by way of general security for the performance of the covenants in the charter-party, nor for any payment for which he might not detain it in the absence of such a clause, so that with us the clause is inoperative. In the cases where a lien is allowed it is not derived from this clause, but either from some general principle of law, or some special contract." In *The Schooner Volunteer and Cargo*, 1 Sumner, 551, 572, the question as to what effect was to be given to the clause, came up before Mr. Justice *Story*. And that learned judge, after referring to Lord *Tenterden's* remarks above cited, expressed a very strong opinion in favor of considering the above clause as constituting a special contract giving or reserving the lien. There is also a strong *dictum* of *Parker, C. J.*, to the same point, in *Pickman v. Woods*, 6 Pick. 248, 252. "And it is also most usual to stipulate that the goods are bound for the freight, or that freight shall be paid or secured on delivery; and in all such cases the lien is considered perfect, notwithstanding there are covenants in the charter-party for the payment of freight." The charter-party, in the case of *Howard v. Macondray*, 7 Gray, 516, contained this clause. In delivering the opinion of the court, *Dewey, J.*, spoke of it as follows: "Although it may have no efficacy in securing a lien on the merchandise at the port of delivery, when, by the terms of the contract, the freight is to be paid elsewhere, and at a time different from the delivery of the cargo, yet it may have its full effect in reference to freight to be paid at the place of delivery of the goods, and may operate and have full effect under the new stipulations entered into by these parties, as to the time and place of making the second payment for freight. It furnishes evidence at least that the parties to the charter-party intended to secure the usual maritime lien, which exists where not displaced by the existence of inconsistent stipulations, and should lead us very carefully to consider whether the usual maritime lien for freight did not exist upon this cargo at the port of delivery. It is to be borne in mind that such lien will exist unless clearly displaced by the terms of the contract between the parties as to the payment of freight." See also *The Kimball*, 3 Wallace, 37, 44. But if the charter-party contains clauses clearly inconsistent with the lien, it seems that the general clause will not give a lien. The meaning of the clause then is that there shall be a lien so far as a lien is possible. *Foster v. Coldby*, 3 H. & N. 705, 716.

the consignee, can fall back on the shipper. The cases, as we have seen, are in some conflict; but, on the reason of the question, and perhaps on the weight of authority, we should come to this conclusion: That the master should collect his freight from the consignee if possible, and should insist upon his lien if necessary for that purpose; but that this obligation is not so peremptory that he loses all right to his freight if he fails in it; because the clause, requiring the consignee to pay on delivery, which asserts the lien of the master, is intended primarily for his protection and benefit, but not altogether so; and if he gives up the goods in good faith, and afterwards is unable to collect the freight of the consignee, he cannot call on the consignor if the goods belonged only to the consignee, and the consignor was but his agent or factor in the transaction, but may call on the consignor if the goods were his property.<sup>1</sup>

We should apply this rule equally to the case of a charter-party, and of freight under bill of lading only. For if the consignor own the goods, he is not harmed by being obliged to pay the freight, because he would have been obliged to repay it to the consignee had the master obtained it from the consignee. And this reason may perhaps suggest the only exception; and that is, where the consignor, in good faith and without notice from the master or owner has, by reason of the laches of the master, paid the consignee for the freight, or so changed the state of his accounts with him that he would lose the freight if obliged to pay it to the master.<sup>2</sup>

<sup>1</sup> See *ante*, p. 210, note 1.

<sup>2</sup> In *Tapley v. Martens*, 8 T. R. 451, the consignor requested the consignee to pay the freight, as he was indebted to him in more than the amount. The consignee, instead of doing this, drew a bill of exchange on the consignor for the freight, and delivered it to the captain. The consignor was held liable for the freight. So in *Collins v. The Union Transp. Co.* 10 Watts, 384, the plaintiffs in error purchased goods in Philadelphia. They were carried by the line of the defendants in error to Pittsburg, consigned to H. & L., merchants there, to be forwarded by them to the plaintiffs. The bills of lading given by the defendants stated that freight was to be paid on delivery to H. & L. They were delivered, however, without payment. H. & L. never paid the freight, but drew upon the plaintiffs for the amount, and the draft was paid at maturity. The plaintiffs were nevertheless held liable. The cases above cited show that the mere fact of the consignor having advanced the money to the consignee to enable him to pay the freight, or a subsequent settlement with him, will not relieve the consignor, if he would be otherwise liable, from his responsibility to the party, who has contracted

Where goods shipped abroad were sold at an intermediate port, and the proceeds applied to the payment of freight, under the charter-party, such goods were held not to be subject to a lien for the charter-money due, on arriving at the ultimate port of destination.<sup>1</sup>

#### SECTION IV.

##### OF THE PAYMENT BY A CHARTERER.

If the master receives the freight, not in cash, but in a bill or note which turns out to be valueless, he cannot then, perhaps, call on the consignor or consignee, in those States (as Massachusetts, Maine, and Vermont)<sup>2</sup> where negotiable paper is *prima facie* payment of the debt for which it is given; and not anywhere, if he voluntarily elects to receive payment of the freight in this way. But if he receives bills or notes for his freight because he can get nothing else, and whether it be so or not seems to be a question for the jury, then, if they are dishonored, his claims against the consignee or consignor, revive.<sup>3</sup>

If payment is made by a bill or note which turns out to be worthless, the question has arisen whether the ship-owner can give up the bill or note, and claim a lien on the goods; and it has been held

to carry his goods. But if the master, or the owner of the vessel, neglected to sue the consignor, and in consequence of such delay, the consignor, supposing the consignee had paid the freight, should settle with him on that basis, we should strongly incline to the view that the consignor would not be liable.

<sup>1</sup> The Salem's Cargo, 1 Sprague, 389.

<sup>2</sup> See 2 Parsons on Notes & Bills, p. 150 *et seq.*; and *ante*, p. 104, note 2.

<sup>3</sup> The Salem's Cargo, 1 Sprague, 389. In *Tapley v. Martens*, 8 T. R. 451, the consignor was held liable. But the court said: "If the fact had been, as supposed in argument by the defendant's counsel, that the consignee had been ready to pay in money and the plaintiff had taken this bill for his own accommodation, there would have been some weight in the argument, but the fact was otherwise." So if the plaintiff had been guilty of any negligence, after he had taken the bill, in not endeavoring to enforce payment of it. See also *Marsh v. Pedder*, 4 Camp. 257, 262; *Grant v. Wood*, 1 Zab. 292. In *Strong v. Hart*, 6 B. & C. 160, it was held, that an instruction that the jury should find for the defendants if they thought that the captain took the bill voluntarily and for his own convenience, was correct; and that the defendants were not bound to prove that an offer was made to pay in cash. See also *Anderson v. Hillies*, 12 C. B. 499, 10 Eng. L. & Eq. 495.



that he may do so, unless the time given for payment by the bill or note is inconsistent with the right of lien.<sup>1</sup> As the current of authority in this country gives the master a lien on the freight, not only for his disbursements for the ship, but for his own wages also, — on both points differing from the English law,<sup>2</sup> — it should follow that payment of freight by the shipper to the owner, would not be available as a defence against a demand of freight from the shipper by the master, provided the master had notified the shipper of his claim, and requested him not to pay over the freight, or at least to reserve as much as would satisfy the master's claim.<sup>3</sup>

The master can retain the goods against a purchaser; and if part be delivered, he can retain the residue; and he may retain any part of the goods belonging to one person, for all the freight due from that person. But if the consignee sells the goods to different purchasers, and the part sold to one is delivered to him, the master can retain the residue, which belongs to other purchasers, only for the freight due on that residue, and not for the freight due on the part delivered. Such at least is the doctrine laid down by all who have treated of this subject, confirmed as we suppose by practice, and resting upon one adjudicated authority at least; but in a recent case the English courts cast some doubt upon it.<sup>4</sup>

<sup>1</sup> The *Kimball*, 3 Wallace, 37. In this case the note was given in Massachusetts, and it was contended that by the law of that State a note was a payment, but the court held that it was merely a presumption of payment which might be repelled by any circumstances showing that such was not the intention of the parties.

<sup>2</sup> See *post*, c. 13, § 2.

<sup>3</sup> *White v. Baring*, 4 Esp. 22. But see *Atkinson v. Cotesworth*, 3 B. & C. 647, 5 Dow. & R. 552. In this country the law is as stated in *White v. Baring*. See *Lewis v. Hancock*, 11 Mass. 72. In *Ingersoll v. Van Bokkelin*, 7 Cow. 670, 5 Wend. 315, a bailee with whom the master had deposited the goods, was held liable for them in trover, he having delivered them over to the consignee by order of the owner of the ship, to whom the consignee had paid the freight.

<sup>4</sup> In *Sodergreen v. Flight*, cited in *Hanson v. Meyer*, 6 East, 622, the action was brought by the captain of a ship to recover freight on 850 barrels of tar, which had been shipped by one Hippinus. He sold the barrels to the defendants before the ship arrived. After arrival 721 barrels were delivered, when, Hippinus having stopped payment, the captain refused to deliver the rest, unless they would pay the freight, not only of what remained, but of what had been before delivered, which they refused to do. Subsequently it was agreed that the whole cargo should be delivered up, and an action brought for the freight. Lord *Kenyon* held that the plaintiff was entitled to recover freight for the whole amount. The

If the voyage for which the vessel is chartered, be, as it often is, a double voyage, that is, a voyage out and home; the question

Reporter then adds: "His lordship being of opinion that the captain had a lien on the tar remaining on board for the whole freight, as well the freight of the barrels delivered as of those remaining on board, belonging all to the same person and under one consignment. But he thought that if Hippius had sold the tar to different persons, the captain could not have made one pay for the freight of what had been delivered to another." On the authority of this case, it has been laid down in all the works on the law of shipping, that a captain, if he delivers part of a cargo, has a lien on the rest for the freight of the whole, provided it belong to one person. By the bills of lading in this case, the tar was deliverable unto order, "he or they *paying freight for the said goods*." The question of the lien of the captain did not arise, the only point in dispute being whether the captain, having delivered the tar, could recover freight from the purchaser, which seems under the circumstances not to admit of doubt. The precise question of the lien of the captain was decided in a late case in England. *Möller v. Young*, 5 Ellis & B. 7, 30 Eng. L. & Eq. 345. The plaintiff, being the owner and master of a ship, sued the defendants for not accepting goods transported in his vessel in a reasonable time. The defendants were indorsees of a bill of lading, by which the goods were deliverable to them on payment of freight, as per charter-party. This latter instrument provided that the cargo should be delivered on payment of freight, and that freight should be paid on delivery of the cargo. On the arrival of the vessel, a portion of the cargo was delivered. The plaintiff refused to deliver the rest till freight for the part already delivered had been paid, and the defendant refused to pay any freight till the whole had been delivered. Ten days, beyond the running days mentioned in the charter-party, elapsed before the plaintiff would consent to deliver the rest of the cargo. As soon as this was done, the defendant paid the freight for the whole. The Court of Queen's Bench held that the plaintiff was entitled to recover on the ground that the master was not bound to deliver the whole till he was paid for that already delivered, and that a delivery of a part did not waive the lien as to the residue. This decision was reversed by the Court of Exchequer Chamber, 5 Ellis & B. 755, 34 Eng. L. & Eq. 92. It was there held that the master might assert his right of lien, and refuse to deliver the goods until he was paid his freight, but that if he waived this right he was bound to deliver the whole cargo, and when this was done there was evidence of a contract on the part of the consignee to pay freight for the whole. It will be observed that in this case the consignee was not owner of the goods. In a case where he is, the law may be otherwise. In *Bernal v. Pim*, 1 Gale, 17, it seems to have been considered that a delivery of part does not defeat the lien as to the residue, but that if there are two contracts to carry for the same person, with different termini in each contract, no lien attaches for freight under the one upon goods shipped under the other. *Sodergreen v. Flight* was also fully sustained in *Boggs v. Martin*, 13 B. Mon. 239. And see *Fuller v. Bradley*, 25 Penn. State, 120; *Barnard v. Wheeler*, 24 Maine, 412; *Brittan v. Barnaby*, 21 How. 527; *Lane v. Old Colony R. & F. Ry.*, 143.

occurs whether any freight is due if the vessel safely performs the outward voyage and delivers her cargo, but is lost before her return home. It is perhaps impossible to give any general rule which shall always answer this question, because each case must be judged of by itself; and these cases, as they are presented in the books, often involve questions of mingled fact and law which are sometimes of great difficulty. There is nothing to prevent the parties from making such a bargain on this point, as they choose to make. They may say distinctly, that so much freight shall be paid if she performs one passage in safety, so much if another, and so on for the rest; or they may agree that nothing shall be payable by way of freight, unless she performs all of them, and brings the last cargo home in safety. And the question always is, which of these two things did they mean to express by the words which they used.

There is perhaps some tendency in the courts to look upon such voyages as distinct, especially if the shipper or charterer derives a distinct benefit from each voyage, and receives his goods at the end of each with their value enhanced by the carriage; and in such a case, nothing but plain language, providing that no freight shall be earned unless the whole voyage or all the passages be duly performed, would suffice to destroy the owner's claim for freight *pro rata*.<sup>1</sup> The vessel may be hired on time only, and freight is then

<sup>1</sup> The law is stated by Lord *Mansfield* as follows: "If there be one entire voyage out and in, and the ship be cast away on the homeward voyage, no freight is due, no wages are due, because the whole profit is lost; and by express agreement the parties may make the outward and homeward voyages one. Nothing is more common than two voyages; whenever there are two voyages, and one is performed, and the ship is lost on the homeward voyage, freight is due for the first." *Mackrell v. Simond*, 2 Chitty, 666. See also *Molloy, de Jure Mar.* Book 2, ch. iv. § 9; *Malynes*, p. 98. In the following cases it was held that the voyages were distinct, and freight was payable for those performed. *Mackrell v. Simond, supra*; *Brown v. Hunt*, 11 Mass. 45; *Locke v. Swan*, 13 Mass. 76. In the case of *Towle v. Kettell*, 5 Cush. 18, the charter-party described the voyage from Boston to Wilmington, N. C., and from thence to Cape Haytien in the island of Hayti, and from thence back to Boston. The clause relative to the payment of freight was as follows: "for the charter or freight of the said vessel during the voyage aforesaid, in the manner following, that is to say, fifteen hundred dollars, say so much in Hayti as the master may want for the disbursement of the vessel, and the balance on the discharge of the cargo in Boston, together with all port-charges, lighterage, and pilotage in Hayti." The master

to be paid at the times specified, and each stipulated period of payment is considered as a separate voyage.<sup>1</sup> And where, in such a case, freight is to be paid at a certain rate per month, and "at the same rate for any part of a month," it is considered as earned till the time of the loss of the vessel.<sup>2</sup>

As it is the owner's duty (unless otherwise stipulated) to keep the ship in good repair, he not only may, but must, use sufficient time for that purpose; and during that time the charterer pays as for any other part of the period for which he hires the ship.<sup>3</sup> And if the charterer has possession of her, it is his duty to see that she is kept in repair, although the owner be ultimately liable to him for the expense. He must not abandon the ship as long as she is seaworthy, or can be kept so, or made so by any reasonable efforts. And if the owner retains possession, the charterer must not take his goods out, or abandon the voyage, so long as the owner can keep her or make her fit for the voyage, unless he distinctly refuses, by word or act, to do so.<sup>4</sup>

was to have what freight could be got from Boston to Wilmington. The vessel was lost on her return voyage from Hayti to Boston. The court held that the voyage was an entire one, and that no freight was due, that the provision for paying the master at Hayti what he might want for the disbursements of the vessel could not affect the construction of the instrument. In the following cases also, the voyages were held to be entire: *Byrne v. Pattinson*, in K. B. Trinity Term, 37 Geo. 3, Abbott on Ship. 466; *Smith v. Wilson*, 8 East, 437; *Coffin v. Storer*, 5 Mass. 252; *Liddard v. Lopes*, 10 East, 526; *Scott v. Libby*, 2 Johns. 336; *Barker v. Cheriot*, 2 Johns. 352; *Penoyer v. Hallett*, 15 Johns. 332; *Burrill v. Cleeman*, 17 Johns. 72; *Blanchard v. Bucknam*, 3 Greenl. 1; *Hamilton v. Warfield*, 2 Gill & J. 482. See also *Gibbon v. Mendez*, 2 B. & Ald. 17; *Crozier v. Smith*, 1 Scott, N. R. 338; *Sweeting v. Darthez*, 14 C. B. 538, 25 Eng. L. & Eq. 326.

<sup>1</sup> *Havelock v. Geddes*, 10 East, 555.

<sup>2</sup> *M'Gilvery v. Capen*, 7 Gray, 525.

<sup>3</sup> *Havelock v. Geddes*, 10 East, 555; *Ripley v. Scaife*, 5 B. & C. 167.

<sup>4</sup> *Kimball v. Tucker*, 10 Mass. 192. In this case it was held that where the vessel became unseaworthy during the voyage, the hirer could not stand still calling for repairs, but must provide whatever was necessary, at the expense of the owner, to enable the vessel to complete her voyage. *Sewall, J.*, on page 196, said: "If the vessel, sufficient at the commencement of the voyage, be entirely lost in the course of it, the one must betake himself to another vessel, and the other loses his freight-money, but nothing more, upon the contract of charter-party. The hirer must not abandon the vessel while he can keep her afloat and suitably provided for the employment and destination for which she was hired: and the owner must be ready to pay all expenses and damages necessarily in-

If there is a deviation by the vessel from the voyage agreed on, which is authorized by the agent of the charterers, they are liable to pay the stipulated price.<sup>1</sup>

## SECTION V.

### OF DEMURRAGE AND LAY DAYS.

In all commercial and maritime affairs, time is an element of great value and importance. It should follow, therefore, that both parties should be punctual. If the ship is not ready when she should be, but a material delay seems to be probable, the charterer may seek another ship; if the cargo be not ready, the owner may seek another cargo.<sup>2</sup> If a vessel is chartered to load at a foreign

curred for the purpose." In *The Agricultural Bank v. Barque Jane*, 19 La. 1, it was held, that where a vessel was chartered and put up as a general ship by the charterers, the shippers of goods could not maintain an action against the owners for damage done to their goods through the unseaworthiness of the ship, but that their action was against the charterers, though they in turn might recover from the owners whatever they might have to pay.

<sup>1</sup> *Baker v. Pratt*, 4 Allen, 158.

<sup>2</sup> Thus in *Weisser v. Maitland*, 3 Sandf. 318, the charter-party provided that the charterer should be allowed for the loading and discharging of the vessel as follows: "Lay days, to load, twenty days from the twelfth." The owner guaranteed to have the vessel ready by that time. The charter-party was to commence when the vessel was ready to receive her cargo, and notice thereof given to the charterer. It was held, that the vessel's being ready on the day named was a condition precedent to the charterer's liability to put on board the cargo. The court said: "Time was of the essence of the contract, and it is often so in commercial transactions. The success of the enterprise often depends upon dispatch. It was plainly the intent of these parties to be ready by the twelfth of April at all events. The cases show that the great principle to be considered is the intent of the parties, and where the time is essential, and the words of the charter-party are plain, as in the case here, we cannot doubt that the agreement, in reference to the day when the vessel was to be ready, is to be regarded as a condition precedent." See also *Seeger v. Duthie*, 8 C. B. n. s. 45; *Shadforth v. Higgin*, 3 Camp. 385; *Glaholm v. Hays*, 2 Scott, N. R. 471; *Shubrick v. Salmond*, 3 Burr. 1637; *Soames v. Lonergan*, 2 B. & C. 564; 2 *Parsons on Contracts*, 5th ed. 660. It was held in *Pope v. Bavidge*, 10 Exch. 73, 28 Eng. L. & Eq. 569, that, where it was agreed that the ship should make six successive voyages, and that they should not be made later than the last day of February, 1853, a plea that during three voyages the ship sustained great damage from the dangers of the

port and to proceed thence with the cargo to one of several other ports, it has been held that the master need not communicate with the charterer, and if orders are not sent within a reasonable time, he may proceed to either of the ports mentioned.<sup>1</sup> The ship-owner must perform the voyage in as short a time as is consistent with safety, and for any loss sustained by the charterer in consequence of the voyage being protracted by any culpable act of commission or omission, the owner is liable.<sup>2</sup> The charterer must load and unload with all reasonable despatch; and the owner must give him all reasonable facilities; and for non-performance of these obligations, on either side, the injured party may have his remedy, without any express stipulations.<sup>3</sup>

If there be an express contract in relation to these obligations, the parties are held strictly to its terms, and, generally speaking, no excuse is available for delay, though without the fault of the party, which is not given by the contract itself. But in the absence of an express agreement, there is an implied contract that the owner and consignee of the goods will provide for discharging them in a reasonable time; and it has been held that this time is for the jury to ascertain, upon a consideration of all the circumstances.<sup>4</sup>

It is usual, however, to provide for all obligations of this kind under the name of Demurrage. Sometimes it is provided that the ship shall be ready on a certain day, and if not, the charterer shall be allowed so much for every day that he is delayed. More often, and, indeed, almost always, it is provided that the charterer may have so many days for loading and for unloading the ship, and that he may detain her more, if he will pay so much for each additional

seas, which damage was necessary to be repaired before the ship could proceed on her fourth voyage, and this could not be done before the last day of February, 1853, had elapsed, was no answer to an action for a breach of the contract.

<sup>1</sup> *Sieveking v. Maass*, 6 Ellis & B. 670, 36 Eng. L. & Eq. 185. Affirmed in the Exchequer Chamber, 6 Ellis & B. 674, 36 Eng. L. & Eq. 187.

<sup>2</sup> *The Bark Gentleman*, Olcott, Adm. 110, 1 Blatchf. C. C. 196.

<sup>3</sup> See *Sweeting v. Darthez*, 14 C. B. 538, 25 Eng. L. & Eq. 326; *Harris v. Dreesman*, Exch. 1854, 25 Eng. L. & Eq. 526; *Clendaniel v. Tuckerman*, 17 Barb. 184.

<sup>4</sup> In *Cross v. Beard*, 26 N. Y. 85, the doctrine above stated was asserted; and the consignee of goods to be discharged at his own wharf on Lake Ontario, was permitted to explain and excuse his delay in giving a berth to the ship, by proof that a break on the Erie Canal, and a storm on the lake, had caused an unusual number of vessels to be collected at his wharf before the arrival of his goods.

day, or that if he detain her longer, he shall pay so much. If the whole charter be on time, there is no need of these provisions. If it be for a voyage or voyages, then these days, for which he pays nothing, are a part of the voyage. They are called lay days, and all belong to the charterer; he is under no obligation to receive the cargo until it suits his convenience, provided he do not exceed the specified number of the lay days for unloading; and if he does not receive it, and in the meanwhile it is lost by a peril of the sea, there is no delivery of the goods, no completion of the voyage, and no freight earned.<sup>1</sup> Nor is the charterer bound to furnish a cargo as soon as requested by the captain, but he can load it any time within the lay days.<sup>2</sup>

If it is stated in the bill of lading that demurrage is to be paid, the reception of the goods by a party, under such a bill, would be evidence of an agreement on his part to pay the prescribed demurrage;<sup>3</sup> without this clause in the bill, however, there is no claim on the consignee for demurrage as such, although there may be a claim for damages caused by delay.<sup>4</sup>

<sup>1</sup> *Lacombe v. Wain*, 4 Binn. 299; *Brown v. Ralston*, 4 Rand. 504, 9 Leigh, 532.

<sup>2</sup> See *ante*, cases cited p. 296, note 2.

<sup>3</sup> *Jesson v. Solly*, 4 Taunt. 52; *Harman v. Gandolph*, Holt, N. P. 35; *Harman v. Clarke*, 4 Camp. 159; *Harman v. Mant*, id. 161; *Stündt v. Roberts*, 5 Dowl. & L. 460. In *Wegener v. Smith*, 15 C. B. 285, 28 Eng. Law & Eq. 356, it was held that it was a question for the jury, whether an indorsee of a bill of lading was liable for demurrage, who received goods under a bill of lading which stated the cargo to have been received "against payment of the agreed freight, and other conditions as per charter-party," and the charter-party contained a provision for demurrage. See also *Smith v. Sieveking*, 4 Ellis & B. 945, 30 Eng. L. & Eq. 382, s. c. affirmed in the Exchequer Chamber, 5 Ellis & B. 589, 34 Eng. L. & Eq. 97. It was held in this case that a bill of lading, by which goods were deliverable to the consignees, "they paying for the said goods as per charter-party," imposed no liability on the consignees to pay demurrage, according to the charter-party, for a detention of the ship at the port of loading which occurred before the bill of lading was signed. In *Chappel v. Comfort*, 10 C. B. n. s. 802, sixteen days were allowed by the charter-party for loading and unloading, and £2 per day were to be paid for any detention beyond. By the bill of lading the cargo was deliverable to the consignees in London, "he or they paying freight as per charter-party." There was also the following memorandum on the bill of lading: "There are eight working days for unloading in London." Held that the consignees, by accepting the cargo under this bill of lading, were not bound to pay demurrage.

<sup>4</sup> *Gage v. Morse*, 12 Allen, 410; *Young v. Moeller*, 5 Ellis & B. 755. "Demurrage," so called, can be recovered only where it is reserved by the charter-party or bill of lading. The remedy, where no such express reservation exists,

Lay days, by the general rule, do not commence until the vessel has arrived at the usual place for unloading.<sup>1</sup> But where such place is a dock, it has been held that they begin when she enters the dock, and not when she reaches her place of discharge in the dock.<sup>2</sup> The parties may, however, stipulate as they please about the time when they shall commence.<sup>3</sup> And it sometimes depends

appears to be by an action on the case in the nature of demurrage, for damages for the detention. Thus, in *Kell v. Anderson*, 10 M. & W. 498, Lord Abinger, C. B., said: "I thought, that as no time was limited by the charter-party from which the demurrage was to be reckoned, it must be reckoned from the time of the ship's arrival at the ordinary place of discharge; and that if she was prevented from discharging sooner by the default of the defendant, *that should have been the subject of an action on the case, and not of an action for demurrage.*" So *Harris, J.*, in the case of *Clendaniel v. Tuckerman*, 17 Barb. 184, said: "It is true that demurrage, properly so called, is only payable when it is stipulated for in the contract of affreightment; but it is also true that when a vessel has been improperly detained by the freighter or consignee of the cargo, the owner may have a special action for the damage resulting to him from the detention." See also *Horn v. Bensusan*, 9 Car. & P. 709; *Atty v. Parish*, 4 B. & P. 104; *Robertson v. Bethune*, 3 Johns. 342. In *Sprague v. West*, Abbott, Adm. 548, it was held that an action would lie against a consignee, who was also the owner of the goods, for detaining the ship beyond the proper time, although the bill of lading contained no stipulation as to demurrage, lay days, or detention. In *Brouncker v. Scott*, 4 Taunt. 1, the master of a ship brought an action to recover a compensation in damages for the detention of his ship beyond a reasonable time for the delivery of her cargo in the port of London, and declared also generally for demurrage. Held, that such an action could not be maintained by the master, whatever right the owners might have to sue in their own names. See also *Evans v. Forster*, 1 B. & Ad. 118; *The Woodbine*, Dist. Court of Colombo, 1 Law Times, n. s. 200. But where the master is owner *pro hac vice* he may maintain the action. *Clendaniel v. Tuckerman*, 17 Barb. 184.

<sup>1</sup> *Brereton v. Chapmani*, 7 Bing. 559; *Kell v. Anderson*, 10 M. & W. 498; *Rowe v. Smith*, 10 Bosw. 268. See *Lawson v. Burness*, 1 H. & C. 396; *Parker v. Winlow*, 7 Ellis & B. 942; *Bastifell v. Lloyd*, 1 H. & C. 388.

<sup>2</sup> *Brown v. Johnson*, 10 M. & W. 331; *Gibbens v. Buisson*, 1 Bing. N. C. 283. In *Bailey v. De Arroyave*, 7 A. & E. 919, the vessel was to have ninety running days, and ten days of demurrage from her arrival at W. being ready to unload and having received pratique. The declaration stated that the defendant did not unload and load the vessel, though she was ready and had performed pratique. Both of which averments were denied by the plea. It was proved that there was no quarantine or pratique given at W. or on that part of the coast, but that the vessel was ready to unload. It was held that she must be taken to have received pratique, when she was at W., ready and at liberty to unload, and that the lay days then commenced.

<sup>3</sup> *Jackson v. Galloway*, 5 Bing. N. C. 71. In this case, by the charter-party,



on the usage of the port.<sup>1</sup> Usage, however, cannot be admitted to vary the express terms of the contract. In a late case, therefore, where the charter-party provided that the vessel should have "quick despatch in unloading," it was held that the consignees could not select a wharf where the vessel would have to wait until another vessel was discharged, and that evidence of a usage that vessels arriving at Boston loaded with coal, not previously sold by the consignees, must wait three days before commencing to discharge, to give the owners an opportunity to sell the coal, was inadmissible.<sup>2</sup>

A delay by capture, or embargo, or by any compulsion, gives no ground for a claim for demurrage, according to some authorities; because for this there must be a voluntary delay; such, at least, appears to have been once regarded as the general principle.<sup>3</sup> But the decisions on this question cannot be reconciled. On the whole, we prefer those which hold that the consignees shall, generally at least, pay demurrage, although no blame be imputable to them, provided the owner be not in fault.<sup>4</sup>

the vessel was to load coals and iron at Cardiff, and proceed with them to Alexandria, the running days to commence on the sixteenth of December. By consent Pembroke was substituted for Cardiff. It was held, that the rest of the charter-party was not changed, and that the lay days commenced on the sixteenth, wherever the vessel might be.

<sup>1</sup> In *Leidemann v. Schultz*, 14 C. B. 38, 24 Eng. L. & Eq. 305, it was provided in the charter-party that the ship should proceed to Newcastle-on-Tyne, and should there be ready, forthwith, to take on board a complete cargo of four keels of coal, and the remainder coke, "in regular turns of loading." It was held that the question, whether the vessel was loaded in a reasonable time, was to be decided with reference to the meaning of the term "regular turns of loading," as explained by the usage of the port. See also on this point, *Taylor v. Clay*, 9 Q. B. 713; *Hudson v. Clementson*, 18 C. B. 213, 36 Eng. L. & Eq. 332; *Nichols v. Jewett*, U. S. D. C. Mass., Boston Daily Adv. March 23, 1857; *Nichols v. Tremlett*, 1 Sprague, 361.

<sup>2</sup> *Davis v. Wallace*, U. S. C. C. Mass., Boston Post, July 30, 1868.

<sup>3</sup> *Douglas v. Moody*, 9 Mass. 548, 555, per *Sewall, J.* In *Duff v. Lawrence*, 3 Johns. Cas. 162, it was held that a delay for quarantine did not give any claim to demurrage, but that where the vessel was not allowed to enter, by government, and the prohibition was permanent, the charterer should pay for the delay, especially as by the charter-party he might have gone to another port, although on payment of a higher freight.

<sup>4</sup> In *Leer v. Yates*, 3 Taunt. 386, a general ship took brandies on board, under bills of lading which allowed twenty lay days for delivering the goods in London,

And if principles assumed to be law in the modern cases are to be adopted, we should say that delay from the elements, as frost,<sup>1</sup>

and stipulated for £4 per day demurrage afterwards. Certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the London docks, until forty-six days after the lay days had expired. The delay in the unloading was caused solely by the act of the consignees of the uppermost goods, yet the consignees of the undermost were held liable. See also *Harman v. Gandolph*, Holt, N. P. 35. So in *Randall v. Lynch*, 2 Camp. 352, 12 East, 179, the vessel could not be unloaded within the stipulated time on account of the crowded state of the London docks, yet the freighter was held liable for the delay. Lord *Ellenborough* said: "The question is, whether the detention of the ship, arising from the inability of the London Dock Co. to discharge her, is, in point of law, imputable to the freighter; and I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to the owner. *He is responsible for all the various vicissitudes which may prevent him from doing so.*" But in *Rogers v. Hunter*, 2 Car. & P. 601, Moody & M. 63, Lord *Tenterden* was of the opinion that a defendant could not be said to detain a vessel, before he could get at his goods. So in *Dobson v. Droop*, 4 Car. & P. 112, Moody & M. 441, he said: "I am of opinion that if a party cannot get his goods, he being prevented by a delay on the part of the owner of other goods on board the same vessel, he is not liable for demurrage. The question here is, whether the removal of the defendant's goods was obstructed by the misconduct of another in not removing his goods; for, if so, the defendant is not liable for demurrage." The weight of authority is certainly in favor of the cases first cited, and we are inclined to believe that they are the more correct in principle. The parties are at liberty to make any contract they please, and if they choose to stipulate that demurrage shall be paid at all events, there seems to be no reason why the consignees should not pay it, even though the delay is not occasioned by their fault, if the owner be not to blame, but if he is in fault then it is clear that the consignees will not be liable. *Benson v. Blunt*, 1 Q. B. 870; *Taylor v. Clay*, 9 Q. B. 713. So, generally, if an owner do not procure the necessary papers for the discharge of the ship, he cannot claim demurrage, but if the defendant request him not to procure them, the defendant cannot set up their not being procured in an action brought against him for demurrage. *Furnell v. Thomas*, 5 Bing. 188.

<sup>1</sup> *Barret v. Dutton*, 4 Camp. 333. But if the detention occur after the vessel is loaded, the charterer will not be liable. *Pringle v. Mollett*, 6 M. & W. 80. In *Jamieson v. Laurie*, 6 Bro. P. C. 474, where a British vessel was detained in St. Petersburg, to take on board her cargo, nearly two months beyond the stipulated time, and then setting sail, was driven back and frozen in for the winter, which began somewhat earlier than usual, demurrage was awarded only to the sailing of the vessel. And so where, by the delay, the vessel lost the opportunity of sailing with convoy, and was obliged to wait nearly two months for another, the owner having covenanted that she should sail with convoy. *Conner v. Smythe*, 5 Taunt. 654. A similar rule was adopted where demurrage was stipulated to be paid whilst the ship was waiting for convoy. See *Lannoy v. Werry*, 4 Bro. P. C.

or tempest, or tide,<sup>1</sup> or from any act of government,<sup>2</sup> or from any positive and certain disability of the consignee, although it could not be in any way imputed to his own fault, that is, neither to his own act nor to his own neglect, should give claim to demurrage. But the parties may stipulate that the charterer shall be liable for no delay which is not caused by his own default.<sup>3</sup>

As a general rule the consignee takes the risk of roads and means of transportation from the dock, and is bound to take the cargo as fast as it is delivered to him from the vessel; but the owner of the vessel takes the risk of working weather, during the time required for the unloading.<sup>4</sup> The original purpose of the provision in regard to demurrage was, first, to hold the charterer to a proper endeavor to save time, and next, to make him pay a proper compensation for all the time of the owner which he might have saved but did not. For a similar reason, if any delay, for which he is not answerable, occurs after the lay days should have begun, these days do not always begin to count from the first day when he can work. Suppose he has forty days to unload the cargo and put on board a new one; and there is a compulsory delay of ten days after these

630. In *Hudson v. Eds*, Law Rep. 2 Q. B. 566, it was held that a provision, "detention by ice not to be reckoned as lay days" extended to lighters coming down the river to bring goods to the ship, that being the ordinary way of loading.

<sup>1</sup> In *Clendaniel v. Tuckerman*, 17 Barb. 184, the vessel had arrived, and notice was given that the captain was ready to deliver the cargo. She was, however, detained by the consignee, and while waiting was capsized by a freshet, and the greater part of her cargo lost. Held, that the consignee was liable for demurrage. See also *Brown v. Ralston*, 4 Rand. 504, 9 Leigh, 532.

<sup>2</sup> *Bessey v. Evans*, 4 Camp. 131; *Hill v. Idle*, id. 327. See also *Bright v. Page*, 3 B. & P. 295, note. In *Brooks v. Minturn*, 1 Calif. 481, where a vessel was seized by the revenue officers, it was held that if the seizure was illegal no demurrage was due, so, if the seizure was legal but occasioned by the fault of the ship-owner or his agent; but the court did not decide how it would be if the seizure had been occasioned by the fault of the consignee. It has been also held that the indorsee of a bill of lading is liable for demurrage occasioned by his not being notified of the ship's arrival, the court holding that, although it is a convenient practice to give notice, yet it is not binding on the shipmaster to do so. *Harman v. Clarke*, 4 Camp. 159; *Harman v. Mant*, id. 161. So demurrage was allowed where the delay was owing to a prohibition of intercourse between the ship and the shore, on account of infectious disease. *Barker v. Hodgson*, 3 M. & S. 267.

<sup>3</sup> *Towle v. Kettell*, 5 Cush. 18.

<sup>4</sup> *Sprague v. West*, Abbott, Adm. 548.

lay days should have begun. If he can now, without extraordinary and unreasonable effort and cost, unlade and lade in thirty days, he must do it; for he has forty days still from the actual beginning of his work, only if the whole of the forty are necessary for the work.<sup>1</sup>

It is usual to call lay days "working days,"<sup>2</sup> or to define them by some similar epithet; but in the absence of such language, and of any language of an analogous meaning, the law merchant would, we think, define the mere word "days," as "running days," and not as "working days,"<sup>3</sup> unless there was some special usage to the contrary.<sup>4</sup>

If, besides the stipulated lay days, the charter-party provides that the charterer or consignee may detain the vessel, at so much a day for a certain period, the master is bound to wait during that whole period if the consignee requests him to do so. But when it expires he may go at once; and if he still delays, and then receives a cargo from the consignee, the consignee would certainly be bound to pay for these additional days, if he had requested the master to remain;<sup>5</sup> and also, we think, if he had made no special request, but had profited by them to put his cargo on board, because the law would imply that the master waited by reason of an understanding with the consignee, and at his request.

If days are to be paid for after and beyond all those provided for, compensation is to be made on the principle of indemnity to the owner of the ship; and the rate for the days agreed on, would not be conclusive as the measure of damages, although it might be evidence.<sup>6</sup>

<sup>1</sup> *Rogers v. Hunter*, 2 Car. & P. 601, Moody & M. 63.

<sup>2</sup> *Brooks v. Minturn*, 1 Calif. 481.

<sup>3</sup> *Brown v. Johnson*, 10 M. & W. 331; *Brooks v. Minturn*, 1 Calif. 481; *Cochran v. Retberg*, 3 Esp. 121, per *Ld. Eldon*, C. J.

<sup>4</sup> And where the law of the country of the port of discharge prohibits working on Sundays or holidays, they will be excluded. *Cochran v. Retberg*, 3 Esp. 121. See also *Gibbens v. Buisson*, 1 Bing. N. C. 283, per *Bosanquet, J.* But in *Field v. Chase, Hill & Den*, 50, it was held to be no defence against the payment of demurrage that the ship arrived at Cuba during the Easter holidays, and that, according to the usage of the place, the custom-house was closed, and the ship could not be entered nor permission obtained to unload, running days being held to include Sundays and custom-house holidays.

<sup>5</sup> *Jamieson v. Laurie*, 6 Bro. P. C. 474. See also *Robertson v. Bethune*, 3 Johns. 342; and p. 296, n. 2, *ante*.

<sup>6</sup> *Moorsom v. Bell*, 2 Camp. 616; *Randall v. Lynch*, *id.* 352.

If the charter be on time, it would seem that the charterer is liable for all the time lost by detention, or embargo, or capture, unless and until the vessel is condemned as prize, for this latter fact dissolves the contract. There must, however, be some limit to this in every case of hostile or public seizure or arrest, although no adjudged cases enable us to lay down the limitation with much distinctness. In the absence of any more definite rule, we should say that, whatever circumstances would suffice to break up the voyage, would suffice to terminate the charter-party, and the liability of the charterer.<sup>1</sup>

## SECTION VI.

### OF THE CONSTRUCTION OF CHARTER-PARTIES.

Although the parties may enter into what stipulations they please, the effect of their stipulations often depends on the legal construction of the instrument which contains them. This construction is always made by the court, and questions relating to it are questions of law and not of fact.<sup>2</sup> All courts, in construing any instrument, pay great regard to the intention of the parties.

<sup>1</sup> *Minot v. Durant*, 7 Mass. 436. A ship was chartered for a voyage from Portland to St. Croix, and back to the United States twice. The defendant covenanted to pay at a certain rate per ton, per month, during the time the vessel should be employed. The vessel sailed for St. Croix where she arrived, and discharged her cargo, and from thence sailed for Wilmington in South Carolina. Here she was detained by an embargo thirteen months and twelve days. After being released, she performed another voyage to the West Indies, and back to Portland, where she was returned to the owner. The defendant claimed to be entitled to deduct the hire during the time of the detention, but the court held that he was bound to pay for the whole time the vessel was in his employ. See also *Brown v. Hunt*, 11 Mass. 45; *Spafford v. Dodge*, 14 Mass. 66, 71; *Odlin v. Ins. Co. of Penn.* 2 Wash. C. C. 312; *The Nathaniel Hooper*, 3 Sumner, 542; *Patron v. Silva*, 1 La. 275; *Bork v. Norton*, 2 McLean, C. C. 422; *McBride v. Mar. Ins. Co.* 5 Johns. 299; *Palmer v. Lorillard*, 16 id. 348; *Baylies v. Fettyplace*, 7 Mass. 325; *Hadley v. Clarke*, 8 T. R. 259; and *post*, p. 328. If the charterer agrees to pay a certain price in case of capture and condemnation, the declaration must show where, when, and by whom the vessel was captured, and that the court which condemned her had jurisdiction. *Stone v. Patterson*, 6 Call, 71.

<sup>2</sup> 2 Parsons on Contracts, 5th ed. 492.

This is to be gathered, if possible, from the words they use, aided by whatever evidence is admissible. And if the intention can be ascertained, it is carried into effect, provided the words used will bear this interpretation without any violation of the rules of legal construction.<sup>1</sup> And in the construction of charter-parties, as of all instruments, a construction which gives effect to all the words and provisions is preferred to one which does not.<sup>2</sup>

One of the questions of this kind which occurs most frequently, in contracts relating to shipping, is whether a covenant be a condition precedent, or an independent covenant. That is, whether a promise made by one party be such, that if he breaks it, this breach is a sufficient excuse for the entire disregard of all his promises by the other party; or is it such, that if he breaks it, the other party is still bound to his promises, but may claim indemnity from him who has broken his promise.<sup>3</sup>

Thus, if an owner contracts that his ship shall go to Liverpool, and there take and bring to Boston a full cargo for the shipper, who agrees to pay him thirty dollars a ton, and the ship, when three fourths laden, sails without sufficient reason, although the shipper has the remaining fourth ready to be put on board, if the promise to take and bring a full cargo is a condition precedent to recovery of freight, the condition having failed, the owner can recover nothing. If it is an independent promise, and the promise to pay thirty dollars a ton another promise, then the owner can claim this freight for all that he brought, and the shipper must pay it; but may still have his action, or his offset, for any damage he sustains by reason of the ship sailing with only part of his cargo.<sup>4</sup>

If the covenant or promise be a condition precedent, the consequence of a breach is that the whole obligation fails on the other

<sup>1</sup> 2 Parsons on Contracts, 5th ed. p. 494 - 499.

<sup>2</sup> Ward v. Whitney, 3 Sandf. 399, 4 Seld. 442. By the charter-party the charterer was to pay "four dollars per chaldron, Pictou mines measure of 30 cwt." The plaintiff contended that the price was fixed at four dollars for each chaldron, Pictou mines measure, and that this was defined to be one of 30 cwt. The defendant contended that the price was to be four dollars for each chaldron, according to Pictou mines measure, without reference to the weight. The court adopted the view of the plaintiff, on the ground that this alone gave significance to the "30 cwt.," although the coal was not weighed at Pictou.

<sup>3</sup> 2 Parsons on Contracts, 5th ed. p. 494 - 499.

<sup>4</sup> Ritchie v. Atkinson, 10 East, 295. See *ante*, p. 293, n. 4.

side. Hence the first, and indeed the only rule which is of much utility in questions of this kind is, that if the covenant or promise is inseparably connected with the whole of the consideration on which it rests, then it is a condition precedent; but if that consideration can be divided into parts, and the promise which is broken can be made to attach to some part, and the promise that is kept to another part, then the bargain becomes in fact two or more bargains, one of which is fulfilled and the others not; and then the covenants or agreements are independent or separable, and do not constitute a condition precedent.<sup>1</sup>

In the case supposed, the consideration for carrying the cargo, is the agreement to pay thirty dollars a ton; now this consideration is divisible by its very terms into thirty dollars per each ton; the promise to carry a full cargo, and the breach of it, may then be divided correspondingly; and the owner has broken all that part of his promise which relates to that part of the cargo which he did not carry, and has thereby released the shipper from paying him for that part of the cargo. But he has kept that part of his promise which relates to that part of the cargo which he has brought, and for so much, therefore, the shipper must keep his promise. So, if the owner promises that his ship shall be stanch and tight; and he carries the cargo, but the ship is neither stanch nor tight, this is not a separable promise in the sense in which a promise to carry a full cargo is; for a ship must be seaworthy, or not seaworthy, as a whole. But it is so far separable, that the effect of the breach of it does not necessarily extend to the whole cargo, and therefore may not to the compensation for carrying it. Therefore the owner would recover his freight, but be liable in damages for any consequences of the bad condition of his vessel, if goods were laden on board; but the freighter might refuse to put the goods on board.<sup>2</sup>

<sup>1</sup> Per *Ld. Mansfield*, C. J., in *Boone v. Eyre*, 1 H. Bl. 273, note a. See also *St. Albans v. Shore*, 1 H. Bl. 270; *Campbell v. Jones*, 6 T. R. 570; *Fothergill v. Walton*, 8 Taunt. 576; *Glaholm v. Hays*, 2 Man. & G. 257; *Barruso v. Madan*, 2 Johns. 145; *Puller v. Staniforth*, 11 East, 232; *Storer v. Gordon*, 3 M. & S. 308. In regard to dependent and independent covenants, see *Porlage v. Cole*, 1 Wm's. Saund. 319; *Roberts v. Brett*, 18 C. B. 561, 36 Eng. L. & Eq. 358.

<sup>2</sup> *Havelock v. Geddes*, 10 East, 555. In this case the owner of a vessel covenanted that he would forthwith make her tight and strong, etc., for a voyage of

So, if he promised to sail with the first convoy ; but waited and afterwards sailed and arrived in safety ; here, too, he would re-

twelve months, and keep her so. To an action of covenant on the charter-party for freight, the defendants pleaded the non-performance of this covenant in bar of the whole demand, and the plaintiff demurred. In giving the opinion of the court, Lord *Ellenborough* said : “ The question upon the plea is, Whether the defendants are entitled to insist that the *forthwith making the ship tight, stanch, etc.*, was a condition precedent. The defendants did not repudiate the ship because she was not immediately made tight, stanch, etc., but took her into their service and employed her ; and after having navigated her for several months, they say that, because this was a condition precedent, and was not performed, they are not liable to pay anything. They do not pretend that the non-performance has damnified them to the extent of the payment they wish to evade ; and, to be sure, if this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, stanch, etc., would be a breach of the condition, and a defence to the whole of the plaintiff’s demand. We are clear, however, that the defendants, who took the ship into their service and employed her in an unimpaired state, have no right to insist that the *forthwith making her tight, etc.*, was a condition precedent. Whether a particular covenant is to constitute a condition precedent depends upon the intention of the parties, as it is to be collected from the instrument in which the covenant is contained. . . . And it would be an outrage to common sense to say, that it could have been the intention of these parties, that if the defendants took to this ship as a ship in their employ under the charter-party, they should be at liberty afterwards to insist that the making her complete in every particular, and that forthwith, without any delay, was a strict condition precedent on the part of the plaintiff. The cases cited are also decisive upon the point. . . . *Boone v. Eyre*, 1 H. Bl. 273, in the notes, lays down a very sensible general rule, that where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other : but where they go only to a part, and a breach may be paid for in damages : there the defendant has a remedy on the covenant, and shall not plead it as a condition precedent. Had the plaintiff’s neglect here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar ; because the consideration for the defendants’ covenant to pay the freight would then have failed *in toto* ; but as the defendants have had some use of the vessel, notwithstanding the plaintiff’s neglect, the plaintiff’s covenant is to be considered as going to a part only : the consideration has not *wholly* failed ; and the covenant cannot be looked upon as having raised a condition precedent, but merely gives the defendants a right, under a counter action, to such damages as they can prove they have sustained from this neglect. For these reasons we are of opinion that this plea cannot be supported, and that the demurrer to it must be allowed.” See also *Tarrabochia v. Hickie*, 1 H. & N. 183, 38 Eng. L. & Eq. 339 ; *Clipsam v. Vertue*, 5 Q. B. 265, 272, per *Ld. Denman*, C. J. ; *Ollive v. Booker*, 1 Exch. 416, 423, per *Parke*, B. ; and *Elliot v. Von*



cover his freight.<sup>1</sup> And a covenant to sail with the first wind is not a condition precedent.<sup>2</sup> Nor is a stipulation to proceed to a place "with all convenient speed,"<sup>3</sup> or to load certain goods.<sup>4</sup> But if it is a part of the agreement that the ship shall be at, or sail from a certain place on or before a certain day there to receive a cargo, and she is not there on that day, this is a condition precedent; so far, at least, as to discharge the freighter from all obligation to load her, as the condition is not fulfilled; but if he loads her and she carries the cargo, then she earns her freight, subject as before to damages for the breach of the provision as to time.<sup>5</sup>

Glehn, 13 Q. B. 632, 641, per *Erle, J.*, to the point that a loading or use by the charterer would be considered as a waiver of the breach of the condition. In *Dunbar v. Smeethwaite*, Q. B. 1854, 24 Law T. 92, 29 Eng. L. & Eq. 189, in an action by a shipper of goods against a ship-owner for a breach of covenant that the ship should be seaworthy at the commencement of the voyage, whereby he was prevented from insuring his goods, the defendant pleaded that before any loss, damage, or prejudice had arisen to the plaintiff the ship was made seaworthy. Held, no plea. A contrary doctrine to *Havelock v. Geddes* has been asserted by the court of appeals in Maryland, that in an action by the shipper against the captain and consignee to recover money retained as freight, the plaintiff might resist the defendant's claim thereto by showing that the vessel was not seaworthy at the commencement of the voyage, and recover accordingly. In this case the ship proceeded upon the voyage, but was compelled by adverse weather to put into a port, not that of destination, where she was condemned. *Dickinson v. Haslet*, 8 Har. & J. 345. But in *Reed v. Dick*, 8 Watts, 479, where the ship was lost by parting her cable, *Gibson, C. J.*, decided that evidence that the sails were insufficient, would not make the carrier answerable for the injury to the goods on board. See also *Hart v. Allen*, 2 Watts, 114; *Collier v. Valentine*, 11 Misso. 299; *Forbes v. Rice*, 2 Brev. 363; *Seeger v. Duthie*, 8 C. B. N. S. 45; *Dimech v. Corlett*, 12 Moore, P. C. 199.

<sup>1</sup> *Davidson v. Gwynne*, 12 East, 381. But when it is covenanted to load the vessel in time to sail with a convoy on a particular day, and the vessel arrives out in time to receive her cargo, but only a small portion of it is laden on the appointed day, the captain is not bound to wait, but may sail with the convoy, although the charterer offer to provide a full cargo in a few days. *Thompson v. Inglis*, 3 Camp. 428. See also *Shadforth v. Higgin*, 3 Camp. 385.

<sup>2</sup> *Constable v. Cloberie*, Palmer, 397; *Bornmann v. Tooke*, 1 Camp. 377.

<sup>3</sup> *MacAndrew v. Chapple*, Law Rep. 1 C. P. 643; *Dimech v. Corlett*, 12 Moore, P. C. 199.

<sup>4</sup> *Fothergill v. Walton*, 8 Taunt. 576. See also *Stavers v. Curling*, 3 Bing. N. C. 355; *Deffell v. Brocklebank*, 4 Price, 36; *Galloway v. Jackson*, 3 Scott, N. R. 753.

<sup>5</sup> In *Glaholm v. Hays*, 2 Man. & G. 257, by the memorandum of charter it was agreed that the vessel should proceed to Trieste, and there load a full cargo, and,

In a late case decided by the Supreme Court of the United States, the charter-party contained the clause "ship to proceed

being so loaded, should proceed to a port in the United Kingdom, upon payment of freight at a certain rate; that forty running days should be allowed the merchants for loading at Trieste, and for unloading at the port of discharge; and twelve days on demurrage, *the vessel to sail from England on or before the fourth of February next.* The vessel did not sail till the twenty-second of that month, being detained by contrary winds. The charterer refused to load any goods on board. Held, that the sailing on or before the fourth of February was a condition precedent. See also *Seeger v. Duthie*, 8 C. B. n. s. 45. In *Shadforth v. Higgin*, 3 Camp. 385, the ship was to go to Jamaica, and the freighter undertook to provide a full cargo in time for the July convoy, provided she arrived out, and was ready by the twenty-fifth of June. Held, that her arrival was a condition precedent. In *Crockewit v. Fletcher*, 1 H. & N. 893, 40 Eng. L. & Eq. 415, the defendant pleaded to an action for breach of a charter-party by refusing to take the vessel, that the charter-party contained a stipulation that the vessel was to sail from Amsterdam to Liverpool on or before the fifteenth of March, and that she did not sail on or before that day. Replication, that the ship was prevented from sailing by dangers and accidents of the seas and by the act of God. On demurrer the replication was held bad. The charter-party contained this clause: "Restraints of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates, and enemies, throughout this charter-party, always excepted." The court held, that, though this might exonerate the plaintiff in the event of the ship being prevented from sailing on the day named by any of the matters excepted, yet it did not affect the condition precedent upon the performance of which the defendant contracted to take and load the ship. And a replication that the defendants had repudiated the charter-party before the time of the sailing of the ship, was also held to be bad. See also *Bright v. Cowper*, Brownl. 21; *Tarrabochia v. Hickie*, 1 H. & N. 183, 38 Eng. L. & Eq. 339. So, where it was agreed that a vessel should be launched and ready to receive cargo in all May, guaranteed to sail in all June, and that she should proceed to a certain port and load a full cargo, it was held, that the readiness to receive a cargo in all May, was a condition precedent to the plaintiff's right to recover for not loading a full cargo; and that a plea stating that the ship was not ready to receive a cargo in all May was good on general demurrer. *Oliver v. Fielden*, 4 Exch. 135. See also cases *ante*, p. 182, note 1. In *Ollive v. Booker*, 1 Exch. 416, a statement that a vessel was *at sea, having sailed three weeks previous or thereabouts*, was held to be a condition precedent. But in *Elliot v. Von Glehn*, 13 Q. B. 632, where the charter-party contained a representation that the vessel was then at Wyburgh, and it turned out that she had just sailed on her voyage from Wyburgh to Hull, it was held, that this was a mere representation and not a warranty. The defendant in this case had made some use of the vessel, by loading part of the cargo, and *Erle, J.*, puts his decision partly on that ground. In another case, where it was covenanted that the ship should sail on or before February 12th, but the charter-party was not to take effect till the fifteenth of March, the time of sailing was held not to be a condition precedent.

from Melbourne to Calcutta with all possible despatch." Held, that this was a condition precedent, and that on the arrival of the ship at Calcutta from Melbourne by way of Manilla, which is out of the direct course, the charterers were not bound to load.<sup>1</sup>

At common law, this doctrine of dependent and independent covenants sometimes works great hardship, if not injustice. But, as applied to contracts relating to shipping, it is seldom laid down without a distinct and adequate reference to the intention of the parties, and the actual justice of the case. Indeed, it may almost be said, that there is a presumption of law, for there is certainly a strong disposition of the courts, against such a construction of a covenant or promise as would make it a condition precedent.<sup>2</sup> For it is obvious that the construction which disconnects the promises, and obliges each party to satisfy the other for so much of his promise as he has kept, saving, however, his right to indemnity for any promises which are broken, would, in the vast majority of cases, do justice, and complete justice, to both parties.

Whenever the courts are called on to construe a mercantile instrument, very great regard is always paid to mercantile usage. But it must always be understood, that, however powerful and important this may be in the interpretation of contracts, it is never suffered to control the express declarations of the parties. The whole influence of usage in the interpretation of contracts, is founded on the reasonable presumption that wherever men act in reference to a subject, in regard to which a distinct and established usage exists, so well known that they could not have been in ignorance of it, they may very fairly be presumed to have made their bargain with reference to that usage; or, in other words, to have made that usage a part of their bargain. But there is obviously no room for this presumption when the parties expressly declare that they had no reference to this usage; or when they make express provision for themselves, incompatible with this usage. And if their express provisions are one with the usage, then there is no

*Hall v. Cazenove*, 4 East, 477. In *Behn v. Burness*, 3 Best & S. 751, a description of the ship as "now in the port of Amsterdam," was held to be a condition precedent.

<sup>1</sup> *Lowber v. Bangs*, 2 Wall. 728.

<sup>2</sup> See cases *supra*.

need of calling on that, either to interpret or enforce the written agreement.<sup>1</sup>

Where a vessel was chartered to go up a river in North Carolina, take a cargo of lumber and convey it to Boston, and the charter-party contained a guaranty that there should be eight feet of water at the place of loading, it was held that it amounted to a guaranty that there should be eight feet of water all the way.<sup>2</sup> An agreement reciting that "it is understood that a certain vessel is now on a voyage to Australia, thence to Calcutta, where she is to load for Boston," and that certain parties agree to furnish a certain amount of goods for her return cargo from Calcutta, has been construed as an absolute contract, and not as one depending on the contingency of the vessel's going to Calcutta.<sup>3</sup>

In a late case in England the charter-party contained this provision: "The charterers' liability in this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge, the captain having an absolute lien on it for freight, dead freight and demurrage, which he or the owner shall be bound to exercise." It was held that a plea that the cargo was worth the freight at the port of discharge was a good answer to an action for delay in loading.<sup>4</sup>

The charter-party generally provides that the owners will not be responsible for a loss arising from the perils of the seas, and it has been held that they would not be liable for such a loss, were the clause omitted.<sup>5</sup> And the plaintiff is not obliged to negative the

<sup>1</sup> See 2 Parsons on Contracts, 5th ed. 535-537; *Phillipps v. Briard*, 1 H. & N. 21, 37 Eng. L. & Eq. 480; and *ante*, p. 227. But usage is only admitted in the case of contracts, and is, therefore, not admissible in cases of general average, for the right to contribution does not arise from contract, but depends upon a principle of natural justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure should unite to make good the loss which that sacrifice occasioned. Per *Curtis, J.*, *Sturgis v. Cary*, 2 Curtis, C. C. 382.

<sup>2</sup> *Shaw v. Hart*, 1 Sprague, 567. This case was affirmed on appeal, *Hart v. Shaw*, 1 Clifford, C. C. 358.

<sup>3</sup> *Higginson v. Weld*, 14 Gray, 165.

<sup>4</sup> *Bannister v. Breslauer*, Law Rep. 2 C. P. 497. See also *Oglesby v. Yglesias*, Ellis, B. & E. 930; *Milvain v. Perez*, 3 Ellis & E. 495.

<sup>5</sup> *The Casco*, Daveis, 184. In this case, *Ware, J.*, said: "It is usual in charter-parties of affreightment, as well as in bills of lading, to insert a clause specially exempting the master and owners from losses occasioned by the dangers of the

exception in his declaration, but the defendant, if he wishes to avail himself of it, must plead it.<sup>1</sup> It is sometimes provided that the voyage shall terminate on the vessel's entering a certain port, and what constitutes such entry depends in a great measure on the intention of the parties, and is a question for the jury in every case.<sup>2</sup>

Many questions have arisen in respect to stipulations in charter-parties concerning the "sailing" of the vessel, or her "departure" from a certain place. We have treated fully of the meaning of these phrases in our work on insurance, as they most frequently occur in contracts of insurance.<sup>3</sup> Where a risk is excepted "during the voyage," it would seem that the exception is effective only while the ship is out of port, and is not in force during the loading.<sup>4</sup> If

seas. This instrument contains no such exception, but this, as was justly contended in the argument for the respondents, is an exception, which the law itself silently supplies without its being formally expressed. It is a general rule of law, founded upon the plainest and most obvious principles of natural justice, that no man shall be held responsible for fortuitous events and accidents of major force, such as human sagacity cannot foresee, nor human prudence provide against, unless he expressly agrees to take these risks upon himself." It may, however, be doubted whether the carrier, by omitting to insert the exception in his contract, did not thereby assume a risk similar to that of an insurer. See *ante*, p. 251, note. But in *Ames v. Belden*, 17 Barb. 513, the charterer stipulated to return the vessel in as good a condition as she was then in, ordinary use and wear excepted. It was held that if the vessel was lost by an act of God, or by a peril of the sea, he was not liable.

<sup>1</sup> *Wheeler v. Bavidge*, 9 Exch. 668, 25 Eng. L. & Eq. 541.

<sup>2</sup> In *Goddard v. Bulow*, 1 Nott & McC. 45, the charter-party stipulated that the captain was to proceed directly on his voyage to the port of Lisbon, but if Lisbon was in possession of the French, then the vessel was to proceed to Fayal and there discharge her cargo, and no additional freight was to be paid, but if the freighters ordered the vessel to Fayal when she could discharge her cargo at Lisbon, then additional freight was to be paid. At the bottom of the charter-party was the following note: "It is clearly understood and agreed to by the parties that if the said ship enters the port of Lisbon, she shall there discharge her cargo and the voyage end and determine." Held that the supercargo was justified in going to Lisbon to obtain the information necessary to enable him to exercise his discretion, and that it was a question for the jury whether he entered for the purpose of terminating the voyage or discharging the cargo, or whether it was for the purpose of information.

<sup>3</sup> See 1 Parsons on Mar. Ins. 357-363.

<sup>4</sup> In *Crow v. Falk*, 8 Q. B. 467, it was agreed by charter-party that a ship then at Liverpool should be got ready, and should receive and load from the charterer's

it is stipulated that a vessel shall proceed to a place "with all convenient speed," this means that she shall proceed there in a reasonable time, and evidence that she did not arrive till after the expiration of the season for exporting the articles she was to have carried, is inadmissible to show whether she arrived in a reasonable time.<sup>1</sup> Where goods were shipped to any port or ports on the continent with permission to take them to England in case all the ports on the continent should be *shut*, it was held that the word *shut* meant an occlusion by the municipal authorities of the country, and that the jury could not determine whether or not it was expedient to land the goods on the continent.<sup>2</sup>

If the charter-party contains a clause whereby the goods and vessel are respectively bound in a penal sum, it has been held that such penalty is merely in addition to any other remedy provided for in the covenants, and not a limitation of the liability of the parties.<sup>3</sup>

agents a full cargo, and being so loaded should proceed to Stettin, and deliver the same and so end the voyage, restraints of princes, etc., during the said voyage always mutually excepted. Held, that the exception as to restraints of princes, etc., was applicable only after the ship quitted Liverpool. But in the subsequent case of *Bruce v. Nicolopulo*, 11 Exch. 129, 32 Eng. L. & Eq. 609, the charter-party provided that the vessel after discharging her outward cargo for the owner's benefit, was to proceed to Galatz, or Ibraila, as ordered at Constantinople, or Sulina, by the charterer's agents, and there load a cargo of corn, and therewith proceed homewards and discharge at a port in the United Kingdom, and so end the voyage, restraints of princes and rulers, the dangers of the seas, etc., during the said voyage excepted. Held, that the voyage commenced from the period of the discharge of the outward cargo, and a plea that the vessel while at Ibraila was prevented from loading by the ruler of the country wherein Ibraila is situated was held good. *Pollock*, C. B., said: "If the facts in *Crow v. Falk* be correctly stated in the report, I cannot subscribe to that case." *Martin*, B., "Assuming the case of *Crow v. Falk* to be good law, I am of opinion that this case is distinguishable from it. Here the vessel, after discharging her outward cargo, was to proceed to Galatz or Ibraila, as ordered by the charterer's agents, and I am of opinion that the particular voyage commenced at that time, and, consequently, that the exception as to the restraint of princes and rulers existed from the time of the discharge of the outward-bound cargo, until the completion of the voyage at a port in the United Kingdom." But see *Hurst v. Osborne*, 18 C. B. 144, 36 Eng. L. & Eq. 299, 303.

<sup>1</sup> *Hurst v. Osborne*, 18 C. B. 144, 36 Eng. L. & Eq. 299, 303.

<sup>2</sup> *Mactier v. Wirgman*, 4 Harris & J. 568.

<sup>3</sup> The *Salem's* cargo, 1 Sprague, 386, in accordance with the common-law doctrine as laid down in *Harrison v. Wright*, 13 East, 343. But this point was

The technical principles of the common law have been sometimes applied to charter-parties, and it has been held that a deed *inter partes* cannot operate as a release to strangers, and that a charter-party between A and B, in consideration of a former charter-party between A and C, which former charter-party, in consideration of the freight B was to pay, was thereby declared null and void, A agreeing to cancel the first in consideration of the second, and C was thereby acquitted of all claims which A might have against him in virtue of the first charter-party, does not operate as a release from A to C of the first charter-party.<sup>1</sup>

## SECTION VII.

### OF THE DISSOLUTION OF A CHARTER-PARTY, OR OF ITS OBLIGATIONS.

All contracts may be dissolved by the parties who make them, if they agree in doing so.<sup>2</sup> But they must *agree* in this; for as soon as the contract is effectually and legally made, both parties are bound by it; and neither of them can, without the consent of the other, suspend or annul it, simply by giving notice of his intention to do so before the other party has done any thing whatever under the contract.<sup>3</sup> A consignee of a cargo shipped under a charter-party has no authority as such to waive or change any of its stipulations, or to make any agreement as to the manner in which the ship should be loaded or ballasted.<sup>4</sup>

decided the other way in an early case. *Campbell v. Ship Alknomac*, Bee, Adm. 124, 127. See *Higginson v. Weld*, 14 Gray, 165.

<sup>1</sup> *Storer v. Gordon*, 3 M. & S. 308.

<sup>2</sup> Thus Lord *Denman*, C. J., in *Goss v. Nugent*, 5 B. & Ad. 58, said: "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what will be thus left of the written agreement." See also *King v. Gillett*, 7 M. & W. 55; *Cummings v. Arnold*, 3 Met. 486; *Buel v. Miller*, 4 N. H. 196; *Howard v. Macondray*, 7 Gray, 516. But if the contract be under seal, it requires by the rules of the common law an instrument of as high a nature to terminate it.

<sup>3</sup> See *Tindal v. Taylor*, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210, and cases cited *ante*, p. 179, note 1.

<sup>4</sup> *Rich v. Parrott*, 1 Sprague, 358.

The contract, however, may be dissolved, or its obligations annulled for the parties, against their will, and by causes extrinsic to them. Thus it is an universal rule, that if a contract, which is legal when made, becomes illegal before it is executed, it becomes thereby as wholly void as if it were illegal at the outset. And for the same reason, namely, that the law cannot be called on to enforce a violation of itself.<sup>1</sup> Thus, if a war be declared by the country to which a ship belongs against one to which it was about to carry a cargo, this war makes all commercial intercourse illegal, and thereby annuls all obligation of carrying that cargo.<sup>2</sup> Or if the proper authority of the same country lays an embargo, or passes an act of non-intercourse, or of especial prohibition which extends to that ship and cargo; here the contract becomes illegal. But war annuls such a contract, while an embargo,<sup>3</sup> or prohibi-

<sup>1</sup> See 2 Parsons on Contracts, 5th ed. 673-675.

<sup>2</sup> Ord. de la Marine, liv. 3, tit. 1, Charte-Partie, art. 7; Code de Com. art. 276; *Barker v. Hodgson*, 8 M. & S. 267, per Lord *Ellenborough*, C. J., *Brown v. Delano*, 12 Mass. 370; *Palmer v. Lorillard*, 16 Johns. 348; *Avery v. Bowden*, 5 Ellis & B. 714, 33 Eng. L. & Eq. 133, 137, per Lord *Campbell*, C. J., s. c. 6 Ellis & B. 953, 38 Eng. L. & Eq. 130; *Barrick v. Buba*, 2 C. B. n. s. 563. See also *Esposito v. Bowden*, 4 Ellis & B. 963, 30 Eng. L. & Eq. 336, which was reversed 7 Ellis & B. 763; *Reid v. Hoskins*, 4 Ellis & B. 979, 30 Eng. L. & Eq. 406. See also same case, 5 Ellis & B. 729, 34 Eng. L. & Eq. 51, affirmed 6 Ellis & B. 953, 38 Eng. L. & Eq. 130. In *Clementson v. Blessig*, 11 Exch. 135, 32 Eng. L. & Eq. 544, war had been declared by England against Russia, but there was an order of council passed that Russian merchant vessels, in any ports or places in her majesty's dominions should be allowed six weeks for loading their cargoes and departing; and that such Russian merchant vessels, if met at sea by any of her majesty's ships, should be permitted to continue their voyage, if, upon examination of their papers, it should appear that their cargoes were taken on board before the expiration of the above period. An order had been sent to the plaintiff in England to ship goods to the defendant in Russia, and the defendant promised in payment of the goods to accept the plaintiff's draft for the price. In an action for not accepting, the defendant pleaded that, before the goods were shipped, war was declared, which rendered the contract illegal. The plaintiff filed a replication setting forth the order of council, and averred that the goods were shipped before the expiration of the six weeks. On demurrer the court held that the contract was not dissolved by the war.

<sup>3</sup> In *Odlin v. Ins. Co. of Penn.* 2 Wash. C. C. 312, 317, *Washington, J.*, laid down the law as follows: "It is stated, on the part of the underwriters, as a general rule, that where a contract is lawful at the time it is made, and a law afterwards renders a performance unlawful, neither party shall be prejudiced, but the contract shall be considered at an end. This, as a general rule, will not be



tion,<sup>1</sup> may only suspend it. If the measure is one which may be re-

controverted. But there is an obvious distinction between a law which renders the performance *unlawful altogether*, and one which merely *suspends the performance*, without condemning the subject of the contract. If the trade between this country and any other be wholly interdicted, or partially so, in relation to particular articles; or if, after the contract to carry goods from this to that other country, war should break out between them, the *subject-matter* of the contract becomes unlawful; the prohibition acts directly upon it, and forbids the performance. It is no answer, that the prohibition may, upon a change of circumstances, be removed; the prohibition defeats the contract, and releases the parties from all its obligations. But, in the case of a temporary restraint upon the performance of the contract, the subject-matter of it is not declared to be unlawful, the trade itself is not condemned, — the legality of it is rather admitted, but it is not permitted to be performed for the present. Here the rule applies, that, if a law forbids performance of a contract in part only, he who is bound by it must still perform what he lawfully may. In the case of an embargo, for example, the ship-owner is disabled from commencing his voyage at the specified time, but he is bound to go when the prohibition is removed." See also *Hadley v. Clarke*, 8 T. R. 259, in which case an embargo of two years was held merely to suspend the contract. In the head note to *Bork v. Norton*, 2 McLean, 322, it is stated that a *permanent* embargo would excuse the master from the performance of his contract. In the first place no such point was decided in the case; and, secondly, there is not even a *dictum* to that effect. The court cited *Hadley v. Clarke*, and expressed a doubt whether the principle there laid down would apply to a contract on the lakes, but expressly said that they did not intend to decide the point. However this may be, it is very clear that an embargo, although of indefinite duration, merely suspends the performance of the contract. *M'Bride v. Mar. Ins. Co.* 5 Johns. 209, 308; *Baylies v. Fettyplace*, 7 Mass. 325. It was held in *Touteng v. Hubbard*, 3 B. & P. 291, that where a contract of affreightment by charter-party was entered into between an English merchant and the captain of a Swedish ship, it would be terminated by an embargo laid by the government of Great Britain on Swedish vessels. The general principle of *Hadley v. Clarke* was fully recognized, but it was held the embargo was an act of hostility by the government of Great Britain against Sweden, and that a British subject should not be compelled to indemnify a Swede for the consequences arising therefrom, because this would defeat the objects of the embargo. See also *Conway v. Gray*, 10 East, 536; *Conway v. Forbes*, id. 539; *Maury v. Shedden*, id. 540. *Kent, C. J.*, in *M'Bride v. Mar. Ins. Co. ut sup.*, says the reasonings by which these cases are supported appears to be drawn from political considerations, rather than from principles of law.

<sup>1</sup> See *Richardson v. Maine Ins. Co.* 6 Mass. 102, 111, where the law is stated by *Parsons, C. J.*, as follows: "When the sovereign of the country to which the ship belongs, shall prohibit his subjects from trading with a foreign country or port, whether the prohibition be a consequence of his declaring war against the foreign country, or be made by an express ordinance for any cause at the will of the sovereign, a voyage to that country for the purpose of trade is illicit." See also *Palmer v. Lorillard*, 16 Johns. 348, 356. There is no difference in principle

garded as intended for a brief period only, and if the voyage may be delayed without material damage, and then resumed and completed with no other effect than that of temporary interruption, then we should say that the contract was not dissolved; that the ship, on the one hand, was bound to wait with her cargo on board for the opportunity of carrying it to her port of destination; and on the other, that the ship had the right of insisting upon retaining the cargo for the purpose of thus earning the freight.<sup>1</sup>

If the continuance of this restraint and prohibition be not only uncertain, but, as far as can be judged, likely to continue for a long period, so that it would be unreasonable to detain the ship or

between a complete interdiction of commerce, which prevents the entry of the vessel, or a partial one in relation to the merchandise on board, which prevents it being landed. *Patron v. Silva*, 1 La. 275.

<sup>1</sup> See cases *supra*. As an embargo merely suspends the contract, so a lowness of water, which prevents a vessel reaching the port, has the same operation. *Schilizzi v. Derry*, 4 Ellis & B. 873, 30 Eng. L. & Eq. 312. This was an action by the charterers of a vessel against the owners for a breach of contract. By the charter-party the defendants agreed that the ship should proceed to Galatz, or as near thereto as she could safely get, and there load a cargo, perils of the seas, rivers, and navigation excepted. Galatz is a port of Moldavia, on the River Danube, ninety-five miles from the Soulina mouth. On the 5th of November the ship arrived off the mouth of the Danube. At that time, and until the 7th of January following, the water was so low on the bar at the mouth of the river that the ship was unable to cross. On the 11th of December she was obliged, by stress of weather, to go to Odessa, as the nearest safe port, where she afterwards took in a cargo and sailed for England. On and after January 7th there was sufficient water on the bar for the ship to have crossed and to have gone to Galatz, and there shipped a cargo. Held that under these circumstances the defendants were not justified in putting an end to the contract. The reasons upon which this case was decided are fully set forth in the opinion of Lord Campbell, C. J. He said: "As to the first plea the meaning of the charter-party must be that the vessel is to get within the ambit of the port, though she may not reach the actual harbor. Nor could it be said that the vessel, if she was obstructed in entering the Dardanelles had completed her voyage to Galatz. There can therefore be no doubt as to the first issue. Then, as to the second issue, Were the defendants prevented by dangers and accidents of the seas from completing the voyage? Clearly not. For though, from the 5th of November to the 7th of January, the vessel could not cross the bar at the Soulina mouth of the Danube, yet she might have done so after the 7th of January, and would then have reached her port of destination. How then did the impossibility which brings the case within the exception in the contract arise? When did it arise? . . . He could not, it is true, have safely remained at the mouth of the Danube; but he might have gone, as others went, to Constantinople or Odessa."

the cargo in her to wait this distant opportunity; or if the goods are perishable, and cannot probably survive even a short delay without destruction or great diminution of their value, — we should say the contract was now not suspended, but annulled.<sup>1</sup>

While an embargo actually laid might suspend or annul the contract, it is very clear that the fact that the master had reasonable cause to believe that an embargo would be laid, would not justify him in breaking the contract.<sup>2</sup>

If there be a blockade of the port in which the vessel is lying, and from which she is to proceed on the proposed voyage, this would generally only suspend the obligations of the contract,<sup>3</sup> but might annul them, if the facts gave rise to reasons such as applied in the case above supposed of embargo or prohibition. But the contract is not determined by the unlawful seizure of the vessel by a stranger.<sup>4</sup>

If a blockade be formally notified to a nation, all the citizens thereof must take notice of it at their peril.<sup>5</sup> No ship is bound

<sup>1</sup> See *The Isabella Jacobina*, 4 Rob. Adm. 77.

<sup>2</sup> *Atkinson v. Ritchie*, 10 East, 530.

<sup>3</sup> *Stoughton v. Rappalo*, 3 S. & R. 559. In this case certain barrels of flour had been shipped on a voyage from Philadelphia to Havana. The same day that the bills of lading were signed and the clearances at the custom-house obtained, a blockade of the Delaware was instituted by the British. The master of the vessel refused to deliver up the flour unless the owner would pay one half freight. It was in proof that the cargo would be very much deteriorated in value, if detained on board till the expiration of the blockade, but the court expressly refused to decide the case on this ground, and to say whether or not the contract was dissolved. The decision proceeded entirely on the assumption that, as the vessel had not broken ground, the master had acquired no lien on the goods for the freight. But this principle is incorrect, for we have already seen that though prior to breaking ground the master has no lien, strictly speaking, on the goods for the freight, yet he has a right, from the moment they are laden on board, to retain them till the lien is acquired. See *ante*, p. 179, note 1. We therefore are strongly of the opinion that this case is of no authority in contravention to what we consider now to be the well-established rule of law, namely, that the contract is merely suspended. See the learned and elaborate opinion of Chancellor *Kent*, in the Court of Errors, in the case of *Palmer v. Lorillard*, 16 Johns. 348, overruling the decision of the Supreme Court in the same case, 15 Johns. 14. See also *Ogden v. Barker*, 18 Johns. 87; *Richardson v. Maine Ins. Co.* 6 Mass. 102. But if the port of destination is blockaded the contract is thereby dissolved. *Scott v. Libby*, 2 Johns. 336; *The Tutela*, 6 Rob. Adm. 117.

<sup>4</sup> *Muggridge v. Eveleth*, 9 Met. 233.

<sup>5</sup> *The Neptunus*, 2 Rob. Adm. 110; *The Bark Coosa*, 1 Newb. Adm. 393.

to enter a port which is actually blockaded.<sup>1</sup> If the blockade be only in intention, or by decree, it is only what is called a paper blockade; and it is now settled that it is no breach of the law of nations to enter the port; and a ship might insist upon its right to go there, and a shipper might insist that the ship should carry his cargo thither.<sup>2</sup> But as a ship is bound not to break an actual

This rule has been relaxed to some extent in cases of insurance, and it has been held to be a question of fact for the jury to decide whether the parties knew of the blockade. *Harratt v. Wise*, 9 B. & C. 712. See also *Naylor v. Taylor*, id. 718; *Medeiros v. Hill*, 8 Bing. 231. There are two kinds of blockade known to the law, a blockade *de facto*, and a blockade by notification. In either case there must be an actual blockade, and notice brought home to the party, or facts shown, from which knowledge of the blockade may be presumed. In the case of a blockade by notification, it will be presumed to continue till public notification of its discontinuance is shown, and the burden of proof is on the captured vessel to overcome this presumption. *The Neptunus*, 1 Rob. Adm. 170. Though public notification of the existence of a blockade is customary, still private notification is sufficient. *The Mercurius*, 1 Rob. Adm. 80. It is enough if merely knowledge of the blockade be shown. *The Columbia*, 1 Rob. Adm. 154, 156. Where an enemy's port was declared to be blockaded, and notification thereof was duly made, but about the same time news was received that the blockading squadron had been driven off by a superior force, it was held that the act of sailing for the port under such circumstances would not amount to a breach of the blockade, but that notice of its being resumed should have been given. *The Triheten*, 6 Rob. Adm. 65.

<sup>1</sup> Thus Sir *William Scott*, in the case of *The Columbia*, 1 Rob. Adm. 154, said: "It is unnecessary for me to observe, that there is no rule of the law of nations more established than this; that the breach of a blockade subjects the property so employed to confiscation. Among all the contradictory opinions that have been advanced on the law of nations, this principle has never been disputed; it is to be found in all books of law, and in all treaties; every man knows it; the subjects of all States know it, as it is universally acknowledged by all governments who possess any degree of civil knowledge." See *Williams v. Smith*, 2 Caines, 1; *The Henrick & Maria*, 1 Rob. Adm. 146.

<sup>2</sup> *Grotius*, de Jure Bel. ac Pac. lib. iii. cap. 1, § 5, note 3. To justify a condemnation for breach of blockade three things must be proved: "1st. The existence of an actual blockade; 2dly. The knowledge of the party; and, 3dly. Some act of violation, either by going in or by coming out with a cargo laden after the commencement of the blockade." Per Sir *William Scott*, in the case of *The Betsey*, 1 Rob. Adm. 93. See also *Schacht v. Otter*, 9 Moore, P. C. 150, 33 Eng. L. & Eq. 28; *The Brig Nayade*, 1 Newb. Adm. 366; *The Bark Coosa*, 1 Newb. Adm. 393. This rule, according to a very able writer on international law, has been confirmed by numerous modern treaties, and especially by the convention of 1801, between Great Britain and Russia, which was intended as a final adjustment of the disputed points of maritime law. The third article, section fourth, of this convention declares: "That in order to determine what characterizes a blockaded

blockade, and if it does so, is forfeited by the law of nations, so it is not bound to incur any actual and substantial danger, in attempting to do so, if the port be imperfectly blockaded.<sup>1</sup> Nor has it any right to incur such danger, and jeopardize the cargo, for the purpose of earning its freight. If a vessel is warned off and afterwards returns, this is *prima facie* evidence of a criminal intention to enter, but this evidence may be rebutted by showing that a stringent necessity was the cause of the return.<sup>2</sup>

And it is no breach of law for a vessel to sail for a port which is known to be blockaded, with the hope of finding the blockade terminated, or with the purpose of waiting, at sea or in a neighboring port, until the blockade shall terminate.<sup>3</sup> A ship, therefore, *may*

port, that denomination is given only where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering." Wheaton's Elem. of International Law, 577. The blockade must be maintained by a force sufficient to prevent vessels going out and coming in. *The Nancy*, 1 Act. 57. In *Naylor v. Taylor*, Moody & M. 205, the blockading squadron was a hundred miles distant from the port. It was held that it might lie at any distance convenient for shutting up the port blockaded, provided it thereby obstructed no other. When this case came up on appeal, 9 B. & C. 718, the point does not appear to have been noticed. See also *The Arthur*, 1 Dods. 423; *The Stert*, 4 Rob. Adm. 65; *The Frau Ilsabe*, id. 63; *The Luna*, Edw. Adm. 190; *The Juffrow Maria Schroeder*, 3 Rob. Adm. 147.

<sup>1</sup> Nor has the vessel a right to enter if the blockading squadron is driven off by accident, as by a storm, or a change of wind. *The Neptunus*, 1 Rob. Adm. 170, 171; *The Frederick Molke*, id. 86; *The Columbia*, id. 154, 156; *The Hoffnung*, 6 Rob. Adm. 112, 117; *The Juffrow Maria Schroeder*, 3 Rob. Adm. 147; *Radcliffe v. United Ins. Co.* 7 Johns. 38, 54. The blockade is not terminated by the vessels of the squadron being absent while engaged in chasing suspicious vessels. *The Eagle*, 1 Act. 65. But this chase must not be pursued to such a distance as to interfere with the maintaining of the blockade. *La Melanie*, 2 Dods. 122, 130.

<sup>2</sup> *The Brig Nayade*, 1 Newb. Adm. 366. But the excuse of want of water, which was that made in this case, or the want of provisions, will always be received with great suspicion, and it has been held that the vessel should, in such a case, seek some other than the blockaded port. *The Hurtige Hane*, 2 Rob. Adm. 124; *The Fortuna*, 5 Rob. Adm. 27; *The Sarah Christina*, 1 Rob. Adm. 237, 239. But this rule was held not to apply where there were no open ports near that blockaded. *The Brig Nayade*, *supra*.

<sup>3</sup> *The Shepherdess*, 5 Rob. Adm. 262; *The Betsey*, 1 Rob. Adm. 332; *The Dispatch*, 1 Act. 163; *The Little William*, 1 Act. 141; *Naylor v. Taylor*, 9 B. & C. 718; *Medeiros v. Hill*, 8 Bing. 231. The vessel must not, however, proceed immediately to the blockaded port, but the proper course is to stop at some port of the blockading power for information. See cases cited above. In the case of

do this. But we should doubt whether a ship would have a right to insist upon carrying a cargo to a blockaded port for such a purpose, or whether a shipper could insist that his cargo should be carried, unless the facts were such as showed clearly that the

The *Betsey*, however, as the property was not disputed, and nothing appeared to affect the owners with a fraudulent intention, the vessel was restored, though information was to have been obtained at the blockading port. Where the blockading force had received orders not to capture a vessel, unless previously warned off, it was held that the master might sail direct for the port, and need not make inquiries elsewhere. *Maryland Ins. Co. v. Woods*, 6 Cranch, 29. See, however, *The Columbia*, 1 Rob. Adm. 154. The four cases first above cited are those of American ships seeking a blockaded port in Europe, and for this reason the established rule, that sailing to a blockaded port constituted a breach of the blockade, was relaxed in their favor. Thus Sir *William Scott*, in the case of *The Betsey*, said: "I certainly cannot admit that Americans are to be exempted from the common effect of a notification of a blockade existing in Europe. But I think it is not unfair to say, that, lying at such a distance where they cannot have constant information of the state of the blockade whether it continues or is relaxed, it is not unnatural that they should send their ships conjecturally, upon the expectation of finding the blockade broken up, after it had existed for a considerable time. A very great disadvantage, indeed, would be imposed upon them if they were bound rigidly by the rule, which justly obtains in Europe, that the blockade must be conceived to exist till the revocation of it is actually notified. For, if this rule is rigidly applied, the effect of the blockade would last two months longer upon them than on the trading nations of Europe, by whom intelligence is received almost as soon as it is issued." It may, however, be doubted whether, in case of another war, American vessels would be treated with less severity than vessels of other countries, on account of the facilities of communication afforded by steam navigation, which in those days was unknown. And the ocean telegraph will entirely do away with the distinction existing between American vessels and those of any other country; except so far as the same is regulated by treaties.

When a European port is blockaded, European vessels are not allowed to sail to that port with the intention of not entering if it is blockaded. *The Spes & The Irene*, 5 Rob. Adm. 76; *The Posten*, 1 Rob. Adm. 335, note. By the treaty of 1794, between Great Britain and the United States, provision was made for the inconveniences resulting from the distance between the two countries. Thus the eighteenth article declares that, "Whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested; it is agreed that every vessel so circumstanced, may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper." See *Fitzsimmons v. Newport Ins. Co.* 4 Cranch, 185.

blockade would continue only for a short time, and that the sailing on such a voyage for such a purpose was clearly reasonable and prudent.

These remarks apply to the case where the blockade becomes known after the contract of affreightment is made. If the parties, knowing the blockade, choose to agree that the ship shall go to the port, or near it, and wait for the opportunity of going in, they may hold each other to the contract, for it is not illegal in itself.<sup>1</sup> And although no ship is bound to enter a port actually blockaded, but is indeed bound not to enter it, yet if war breaks out between other countries, which renders the prosecution of the voyage more or less dangerous, this danger, in general, neither dissolves nor suspends the contract.<sup>2</sup> Perhaps it would have that effect if it became imminent and extreme, so as to make the execution of the contract involve the certain, or even the probable, loss of ship and cargo.

If a ship and cargo be captured, and afterwards restored to the master and owner, such capture merely suspends the contract; unless the length of the detention, or other circumstances connected with it, caused the voyage to be broken up without the fault of either party; for this would be considered an actual dis-

<sup>1</sup> Thus *Tindal*, C. J., in *Medeiros v. Hill*, 8 Bing. 231, said: "The contracting parties must be taken to have entered into the charter-party with an equal knowledge of its existence; no difficulty, therefore, attending the performance of the contract can be set up as an excuse for its non-performance. In that case the rule of law laid down in *Paradine v. Jane*, Aleyn, 26, applies, namely, 'That when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.'" See also *Naylor v. Taylor*, 9 B. & C. 718.

<sup>2</sup> *Avery v. Bowden*, 5 Ellis & B. 714, 33 Eng. L. & Eq. 133. In this case a charter-party was entered into between two British subjects, by which the ship was to proceed to Constantinople, and thence to Odessa, where she was to take in a cargo at a stipulated rate of freight, and bring the same home. "In case of war having commenced previous to and continuing on the ship's arrival at Constantinople," the charterer was to load the ship at that port at a reduced rate of freight. It was held that this clause meant such a war as would render the voyage of an English ship from Constantinople to Odessa unlawful, and which, without the clause, would have dissolved the contract; and that the plaintiff was not entitled therefore to a cargo at Constantinople, though a war between Turkey and Russia had broken out previous to, and continued after the arrival of the vessel at that port. Affirmed, 6 Ellis & B. 953, 38 Eng. L. & Eq. 130.

solution of the contract.<sup>1</sup> In a late English case a ship with a part of her cargo on board took fire, was scuttled, and the damaged cargo necessarily sold by the master, who also forwarded by another vessel the portion then lying alongside. The ship was then repaired and tendered to the charterer, who refused to load any further cargo; but it was held that his obligation to load a full cargo remained in full force.<sup>2</sup>

<sup>1</sup> It seems to have been held by the courts of admiralty in England, that the capture of the vessel and the unlivery of the cargo terminate the contract of affreightment. *The Racehorse*, 3 Rob. Adm. 101; *The Martha*, 3 Rob. Adm. 106, note; *The Hoffnung*, 6 Rob. Adm. 231. See also *The Louisa*, 1 Dods. 317; *The Wilhelmina Eleonora*, 3 Rob. Adm. 234. See, however, the judgment of the court in *Beale v. Thompson*, 3 B. & P. 405, 428; *Bergstrom v. Mills*, 3 Esp. 36; *Moorsom v. Greaves*, 2 Camp. 627. In *The Nathaniel Hooper*, 3 Sumner, 542, 556, Mr. Justice *Story* made an elaborate review of the cases decided in the English admiralty, and held that they could not be considered as authority here. He said: "In the first place it is an inadmissible assumption, that the capture dissolved the contract of affreightment. At most, it only suspended it; and it reattached upon the recapture. Recapture confers a title to salvage only, and restores, and does not extinguish, the rights of neutrals, and, *a fortiori*, not the rights of fellow subjects upon the admitted principles of the British laws." And again, p. 559, "In my humble judgment, it would be a most mischievous doctrine to the great interests of commerce and navigation, that a mere unlivery of cargo by a superior force, or by the order of a court of prize, should operate to dissolve a contract made between mere neutrals. How is it in relation to other cases, arising in the common course of navigation? Suppose a ship meets with a calamity in the course of a voyage, and is compelled to put into a port to repair, and there the cargo is required to be unlivered, in order to make the repairs, or to insure its safety, or ascertain and repair the damage done to it; would such an unlivery dissolve the contract for the voyage? Certainly not." See also *Spafford v. Dodge*, 14 Mass. 66.

<sup>2</sup> *Jones v. Holm*, Law Rep. 2 Ex. 335.



## CHAPTER IX.

GENERAL AVERAGE.<sup>1</sup>

## SECTION I.

## OF THE MEANING OF GENERAL AVERAGE.

By the phrase "general average" is meant a loss of a part of the property, which is averaged upon the whole.<sup>2</sup> As a part of the

<sup>1</sup> This chapter is substantially the same with the chapter on this subject in our work on Marine Insurance, with such alterations as adapt it to the law of shipping.

<sup>2</sup> It is strange that so much uncertainty should be expressed, not only by text-writers but by courts, as to the meaning, the limitation, and the proper use of this word "average." Its origin is not certain, nor its early meaning. We should suppose, however, that there could be no doubt as to its present meaning. Chancellor Kent says: "General, gross, or extraordinary average means a contribution made by all parties concerned towards a loss sustained by some of the parties in interest, for the benefit of all; and it is called general or gross average because it falls upon the gross amount of ship, cargo, and freight." 3 Kent, Com. (5th ed.) 232. Average here means ship damage, and not contribution, as is plain when we speak of particular average. The average of common parlance is a secondary sense of the word, derived from the practice of contribution in cases of general average. *Nimick v. Holmes*, 25 Penn. State, 371. *Bargett v. Orient Ins. Co.* 3 Bosw. 385. In the United States, partial loss and average are understood by commercial men to mean the same thing, and average other than general includes every loss for which the underwriter is liable, except general average and total loss. *Wadsworth v. Pacific Ins. Co.* 4 Wend. 33. General average is incurred where the expenses or losses arise in a case of emergency, not produced by the misconduct or unskilfulness of the master, and not resulting from the ordinary circumstances of the voyage. *Ross v. The Ship Active*, 2 Wash. C. C. 226. General average, or general partial loss, arises from a general contribution to which the goods of all may be subjected for the remuneration of a sacrifice incurred for the safety of all, while "particular average" or "partial loss," denotes a loss less than total, arising from a partial injury to the goods, or some of them, from some of the enumerated perils. *Louisville Ins. Co. v. Bland*, 9 Dana, 147. Whatever the master of a ship in distress deliberately resolves to do for the preservation of the whole, in cutting away masts or cables, or in throwing goods overboard to lighten his vessel, which is what is meant by jettison or jetson, is in

law of shipping, this is one of the most ancient rules now in force in civilized countries.<sup>1</sup> It appears from the Rubric "*de lege Rhodia de jactu*," that it was a part of the law of Rhodes. It is in these words: "*Lege Rhodia cavetur ut si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*"<sup>2</sup> "It is provided by the law of Rhodes that if a part of the cargo is thrown over for the purpose of lightening the ship, that which is given up for the benefit of all shall be compensated for by the contribution of all." This law was in force in the commerce of the Mediterranean and Adriatic Seas more than a thousand years before the Christian era; nor can there be a better definition of the law of general average as it is in force to-day.

The right to claim average contribution is a purely maritime right, and nothing like it is sanctioned by authority in relation to land contracts, or to circumstances occurring on the land. Indeed, in Lord Coke's time, the right of claiming contribution was expressly denied in a case occurring on the river Thames; the circumstances of which would give a right of contribution if they occurred at sea; and not only so, but the court declare that the same ruling should be applied to a maritime case, the rule laid down being, that where a vessel is in peril of wreck by tempest, and merchandise is cast overboard, *levandi navis causa*, every one must

all places permitted to be brought into general or gross average; in which all concerned in ship, freight, and cargo are to bear an equal or proportionable part of what was so sacrificed for the common good. It was once held to be essentially necessary, in order to make this jettison or sacrifice legal, that the property lost was so condemned to destruction in consequence of a deliberate and voluntary consultation held between the master and men. 1 *Magens*, 55. After this consultation ceased to be necessary, it was still for a considerable time usual, and regarded as proper. Now it may be said to be neither usual nor proper; indeed it very seldom takes place. Mr. Holt, in his *Treatise on Shipping*, page 482, defines the term as follows: "General average is, in a word, the common law and justice of partnership; and, defined according to its nature, is a compensation from the common stock of a sea venture in the several proportions of the partners of it for the special loss or sacrifice made by one or more for the common good."

<sup>1</sup> Probably the earliest English case on the subject is *Hicks v. Palington*, 32 *Eliz.*, F. Moore, 297. It must have been introduced into English jurisprudence at a very early date; for in 1285 Edward I. sent to the Cinque Ports letters-patent declaring what goods were liable to contribution. See 1 *Rymer Fœdera*, 3d ed. p. 240.

<sup>2</sup> *Dig.* 14, 2.

bear his own loss.<sup>1</sup> This was no longer ago than in 1608, and it illustrates the extreme difficulty which courts of common law found in recognizing the principles of maritime law. It is true that the question of contribution did not come distinctly before the court in this case, but it is impossible to see how the court could have granted contribution under the principles asserted by them.

In our own country we have a somewhat remarkable case occurring in Michigan.<sup>2</sup> A steamer was in danger of perishing

<sup>1</sup> *Mouse's Case*, 12 Coke, 63. This was an action for trespass, brought by Mouse for a casket and a hundred and thirteen pounds, taken and carried away. The facts were these: The ferryman of Gravesend took forty-seven passengers, among whom was the plaintiff, into his barge to pass to London. While the barge was upon the water a violent tempest arose, so that the barge was in danger of being swamped, unless, for its preservation, and that of the lives of the men, a hogshead of wine and other ponderous things were cast out. It was proved that these things were ejected *levandi causa*, some by one passenger and some by another. It was held, *per totam curiam*, that it being a case of necessity, for the saving of the lives of the passengers, the defendant, being a passenger, was justified in casting the casket of the plaintiff out of the barge, with the other things in it, and the plaintiff was accordingly nonsuit. It was also held, that although the ferryman surcharged the barge, yet, for the safety of the lives of the passengers in such a time and accident of necessity, it was lawful for any passenger to cast the things out of the barge; and that the owners should have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if there was no surcharge, and the danger accrued only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safety and life of a man; for *interest reipublicæ quod homines conserventur*, 8 Ed. 4, 23, etc., 12 H. 8, 15; 28 H. 8; Dyer, 36, plucking down of a house in time of fire, &c., and this *pro bono publico; et conservatio vitæ hominis est bonum publicum*. So if a tempest arise in the sea, *levandi navis causa* and for salvation of the lives of men, it may be lawful for passengers to cast over the merchandises, etc.

<sup>2</sup> *Rossiter v. Chester*, 1 Doug. Mich. 154. The facts in this case were as follows: The steamer Missouri, a new and seaworthy boat, having on board passengers and a cargo of goods, on a voyage from Buffalo to Chicago, encountered a very severe gale on Lake Huron. She was in great danger of perishing from the violence of the wind and the roughness of the waves. After long struggling with the tempest, the master and crew agreed that it was necessary to lighten her in order to save her, with her freight and passengers. Accordingly a quantity of goods were, for that purpose, thrown overboard by the crew. The boat was saved, though much injured, and returned to Detroit in safety with the residue of her cargo. It was held, that, although these facts would constitute a proper case under the maritime law for general average, the maritime law was not in force over the lakes; or, in other words, that they were not subject to admiralty

from a tempest; she was lightened by the jettison of a part of the cargo, and the steamer, with the residue of the cargo, was

jurisdiction, which was considered to be restricted to the open sea and to waters navigable therefrom as far as the tide ebbs and flows, and that the doctrine of general average was known only to the maritime law, and could not be enforced in a court of common-law jurisdiction. Speaking of the difficulties that would attend the attempt to enforce a claim for contribution in a court of common law, the court said: "Another insuperable objection to the jurisdiction of courts of common law in questions of average arises from the fact that it would be exceedingly difficult for such tribunals to adjust the interest which is involved in the common calamity. The parties interested in the proceedings may be five or five hundred. The owners of the ship and the freight and the cargo have each a separate and often adverse interest to each other, and it may be readily imagined what embarrassment would necessarily follow an adjustment of such adverse interests in a court of law. Mr. Justice Story (1 Story on Eq. § 491) presents in a strong light the objections to such an assumption of jurisdiction. He says that, 'in a proceeding at the common law every party having a sole and distinct interest must be separately sued; and as the verdict and judgment in one case would not only not be conclusive but not even be admissible evidence in another suit, as *res inter alios acta*; and as the amount to be recovered must in each case depend upon the value of all the interests to be affected, which of course might be differently estimated by different juries, it is manifest that the grossest injustice or the most oppressive litigation might take place in all cases of average on board of general ships.' These difficulties are all obviated by a recourse to those courts whose proceedings are regulated by the course of the civil law. The simplicity and equity of the rules which prevail in such tribunals render them eminently safe, convenient, and expeditious in cases of this nature." But upon the objections here urged, Lord *Kenyon*, in the earlier case of *Birkley v. Presgrave*, 1 East, 220, which was an action by the ship-owner to recover from the owner of the cargo his proportion of a general average loss, incurred by sacrificing the ship's tackle for an unusual purpose for the common benefit, said: "Here the only difficulty pretended is the ascertainment of the proportion to be paid of the general loss in each particular case; and since it is admitted that this may be ascertained in equity, there seems to be no reason why, if it can be ascertained without recourse to equity, an action should not lie to recover it at law. But it is objected that this will lead to a multiplicity of actions. . . . The objection is of no weight in a case like the present. The same inconvenience would exist if there were many persons owners of different parts of a cargo, and an injury were to happen to the whole from the misconduct of the captain; they must all bring their several actions for their respective losses, and no objection could be made to their recovery. Upon the whole, this action, the grounds and nature of which are fully set out in the special count, is founded in the common principles of justice. A loss is incurred, which the law directs shall be borne by certain persons in their several proportions; where a loss is to be repaired in damages, where else can they be recovered but in the courts of common law? and, where-

thereby saved. The court held that these facts would have constituted a proper case for general average under the maritime law; but that the doctrine of general average was known only to the maritime law, and could not be enforced in a court of common-law jurisdiction, and that the maritime law was not in force over lake navigation. This was in 1843; but in 1850 a case occurred in Illinois,<sup>1</sup> in which the court took jurisdiction, although it was a case of general average, and applied the law without any reserve or any intimation, either that the counsel raised, or that the court considered, any objection whatever to its jurisdiction.

It is true that, since the case in Michigan, admiralty jurisdiction

ever the law gives a right generally to demand payment of another, it raises an implied promise in that person to pay." And *Grose, J.*, said: "It is true, where there are many owners of the cargo, there may be as many actions brought, but that arises from the necessity of the thing; and I should still say that they are all liable to answer for their respective proportions."

<sup>1</sup> *Gillett v. Ellis*, 11 Ill. 579. The only objection raised to the claim for contribution was that the goods were stowed on deck, and this objection was not sustained by the court. In a recent case, *Toledo Ins. Co. v. Speares*, 16 Ind. 52, tried in 1861, the court also took jurisdiction, without question, of a case of general average. Here also the only question raised was in regard to the right to claim contribution for a deck-load. In *Gazzam v. Cincinnati Ins. Co.* 6 Ohio, 71, the action was upon a policy insuring \$6,000, agreed value, upon one half of a steam-boat navigating the Ohio River. The boat, by distress of weather, ran on the rocks at the falls of the Ohio, necessitating a jettison, repairs, the hire of extra labor, and other expenses. Among the items of loss for which the jury found the insurers liable were one half of the boat's average for extra expense of labor in getting her off the rocks, one half of her average on jettison of the cargo, and one half her contribution for wages of the crew while on the rocks. The court held that the plaintiff was entitled to judgment for all these expenses, except that for the wages of the crew during the detention, which should be deducted, because where, in case of accident, the crew are retained under their original engagement, their wages are not an extraordinary expense; and, as they are not employed in consequence of the accident, their wages and subsistence do not result from it, and therefore are not chargeable upon the insurer.

Where goods are shipped on board a barge to a port on the Western waters, and the barge on the voyage is accidentally grounded and in danger of being lost by the perils of navigation, together with the goods on board, and it becomes necessary, for the purpose of saving the barge and lumber from destruction, to unload and reload the same, and the master does so unload and reload, and take care of the barge and goods when so unloaded, it is a case for general average. *Dilworth v. McKelvy*, 30 Misso. 149. See also *Louisville Ins. Co. v. Bland*, 9 Dana, 143; and *Firemen's Ins. Co. v. Fitzhugh*, 4 B. Mon. 160; in both of which the courts took jurisdiction of questions of general average arising upon policies of insurance on property upon the Western waters.

has been extended, both by statute and adjudication.<sup>1</sup> But the court of Illinois was a common-law court, and the action was a common-law action. We have no doubt whatever that the law of general average would now be applied to all cases occurring on our Western waters, by the same jurisdictions and in the same way in which it is applied in the Atlantic States to cases occurring on the ocean. We have, indeed, one case in Massachusetts, in which the principles of general average *eo nomine* were applied to a case arising in the city of Boston under a fire policy.<sup>2</sup> The eminent counsel asserting this principle rested it upon the analogy between the law of general average and that of contribution by co-sureties. And Chancellor Kent, speaking of adjustment of losses by fire, says: "So there may be a general average for a sacrifice made by the insured for the common good in a case of necessity. It is analogous to the law of contribution by co-securities."<sup>3</sup> and he refers

<sup>1</sup> An act of Congress, approved Feb. 26, 1845, entitled "An act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same," extended the maritime law of the United States over the lakes, with certain restrictions and limitations therein mentioned.

<sup>2</sup> *Welles v. Boston Ins. Co.* 6 Pick. 182. In this case an insurance against fire was made on stock in trade contained in a store. A fire happening in the neighborhood, the insured, with the consent of the insurer, procured blankets and spread them on the outside of the store, whereby the building and its contents were preserved, but the blankets were rendered worthless. The plaintiffs paid for them, and demanded from the defendants an entire indemnity. The defendants refused to pay the whole of the loss, on the ground that they were not included in the policy, but offered to contribute in proportion to the interest which the parties respectively had at risk. It was held that the loss was not covered by the policy, but that the insurer and insured should contribute to it in proportion to the amount which they respectively had at risk in the store and its contents. The court said: "The plaintiffs can claim then only on the ground of a sacrifice made by them for the preservation of the property endangered by the fire, and for a proportion of which sacrifice they are equitably, if not legally, entitled to recover. They contend, however, that this is not a case proper for contribution, it being customary on fire policies to pay the whole loss. We believe the practice to be as stated; but as the present claim is not within the contract, it certainly is reasonable that the plaintiffs should bear a proportion of the sacrifice made for the common benefit. This decision does not call in question the general principle, that a loss under a policy against fire is to be paid without contribution." This case also decided that other buildings in the neighborhood which would have been endangered if the store had taken fire, were too remotely affected to be liable to contribution.

<sup>3</sup> 3 Kent's Com. 5th ed. 375.

for his authority for this statement to the Massachusetts case above cited. We treat in this work only of marine general average ; and while we admit that this is, strictly speaking, only a part of the system of maritime law, we should also insist that maritime law, or the law merchant (a phrase sometimes used as synonymous with maritime law), is itself a part of the common law.<sup>1</sup>

The rules of general average are founded alike upon justice and expediency ; upon justice, because it is obvious that if A's property was saved, and B's property was sacrificed for the benefit of saving A's, A should indemnify B for his loss. But the reasons of the law derived from expediency are as certain and as obvious as those resting upon justice. If we suppose a vessel with her cargo to be owned by the same person, the rule of general average cannot apply to him. But let us suppose that the cargo is owned by many persons ; an imminent peril threatens the whole with destruction ; this peril may be averted by the sacrifice of a part of the property in peril ; as, for example, by throwing over some of the goods, and so lightening the vessel and enabling her to get off from a rock. Now, but for the law of general average, the owner of the goods thrown over loses them with no compensation from any party ; and it is plain, therefore, that the different owners, if on board, would strive each to save his own ; and in loading the cargo, each owner would naturally endeavor that his goods should be as far as possible out of reach in such an emergency. But it is often important that the goods should be laden in the order and the manner required by their nature, as the heaviest at the bottom, and the lighter above ; for otherwise the ship will lose much of her stability ; and when an emergency arises which calls imperatively for a jettison of a part of the property, it is of extreme importance that no time be lost. If the master, through a previous arrangement with some owner, or influenced by him or his representative on board, undertook to select one man's goods for jettison, and another man's for preservation, the safety of the ship and remaining cargo, to secure which is the only purpose and justification of the jettison, might be greatly endangered. All this is prevented by the rule which makes it entirely immaterial to each owner whether his goods go, or those of another person, for the rest pay him whose property is sacrificed.

<sup>1</sup> *Ante*, ch. 1, pp. 19 - 23.

But the justice and reason of the rule show us that the owner of the goods lost is not to be repaid their full value, for then he would gain an advantage by having his goods and not those of another thrown over. He must be so far compensated that he should lose the same proportion of the value of his property which was sacrificed that he would have lost had the property sacrificed belonged to another owner.<sup>1</sup> In other words, each of the owners benefited must lose as much and save as much as the other owners do, without any reference to the question which owner it was who owned the property sacrificed.

This object is attained by the simple process of first adding together the values of all the property saved, together with the value of the property lost, and then ascertaining the proportion which the value of what is lost bears to this whole value; and every owner must pay that same proportion of his property which was saved to the owner of the property sacrificed. The effect of this is that he is compensated for the property sacrificed, excepting the same proportion or percentage which others lose, and this he also loses. Thus, if a ship be worth \$20,000, the freight, \$10,000, the cargo, \$70,000, of which A owns \$30,000, B \$20,000, and C \$20,000; there is a jettison of A's goods to the amount of \$10,000, which saved all the rest. To ascertain the amount due to him from the other parties, first, the whole property at risk is added together, and in the above case it amounts to \$100,000, of which ninety per cent is saved, and ten per cent is lost. Therefore everybody must lose ten per cent. The ship pays A \$2,000, the freight pays him \$1,000, B pays him \$2,000, C pays him \$2,000; and these payments amount to \$7,000, and he thus remains a loser of \$3,000, which is ten per cent of his property, or the same percentage which the others lose by their contributions to him.

This principle of indemnity, whereby the owner of the property sacrificed is left in no better position and in no worse position than the other owners, may seem to be a very simple one to those who

<sup>1</sup> *Simonds v. White*, 2 B. & C. 805; *Lee v. Grinnell*, 5 Duer, 431; *Abbott on Shipping*, 506. By the civil law, only the goods actually saved were to contribute. *Id tributum servata res debent*. Dig. 14, tit. 2, f. 2. But their rate of contribution may have been such as to leave on the party receiving contribution his share of the loss. By the *Consolato del Mare* it is expressly provided that the property lost contributes in common with that saved. *Consolato del Mare*, cap. 51 of *Pardessus, Lois Maritimes*, vol. 2, pp. 101, 102.



have had much practice in the law of general average; but some obscurity in the apprehension of this principle not only causes some of the difficulties in its application in practice, but, as we think, some uncertainty in the adjudications on this subject.

## SECTION II.

### THERE MUST BE A VOLUNTARY SACRIFICE OF PROPERTY FOR THE BENEFIT OF OTHER PROPERTY.

The voluntariness of the loss is the very foundation, and the only foundation, of any claim for compensation.<sup>1</sup> The owner of the property lost stands in precisely the same position as if he and the other owners stood on the deck of the imperilled vessel, and all saw that the common peril might be averted by the sacrifice of

<sup>1</sup> It is always true, that, in order to make a case of general average, it is necessary, not only that the ship should be in distress, and the property endangered, and a part sacrificed in order to preserve the rest, but that it is necessary also that this sacrifice should be voluntary. *Sims v. Gurney*, 4 Binn. 524. See also *Peters v. Warren Ins. Co.* 1 Story, 468; 3 Kent, Com. 5th ed. 232; *Arnould on Ins.* 881; *Emerigon*, chap. xii. § 39, tom. 1, p. 588 (ed. 1827). But it is important to consider in what sense this is true. To give a claim to contribution, there must be a voluntary sacrifice of property for the benefit of other property *embarked in a common adventure*; if A's vessel is about to come into collision with B's, which is at anchor, and B cuts his cable and thus avoids it, he has no claim for contribution against A for the loss of the cable and anchor. *The John Perkins*, U. S. C. C., Mass. 1857, 21 Law Rep. 87, 97. *Seemle*, that where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average, whether the ship and cargo and freight belong to one only or to different adventurers, or whether they are partially interested. *Oppenheim v. Fry*, 3 Best & S., 873, per *Blackburn, J.* That all losses which arise in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, see *Birkley v. Presgrave*, 1 East, 228; and that all casual and inevitable damage and loss, as distinguished from that which is purposely incurred, is a subject of particular, not general average, see *Shiff v. La. State Ins. Co.* 18 Mart. La. 630. It is deemed essential, in every case of general average, that the mind and agency of man be employed in producing the sacrifice or delay, in contradistinction to such unavoidable detentions and losses as arise from accidents beyond the control of the master. *Spafford v. Dodge*, 14 Mass. 74. General average can only arise where the sacrifice has been made for the common benefit, and has accomplished the object. *Williams v. Suffolk Ins. Co.* 3 Sumn. 513.

his property, and he consented to this sacrifice, which he might have refused; they, in consideration thereof, promising to compensate him therefor. It is plain, therefore, that if his own property, with no action of anybody, but by a mere peril of the sea, is lost, this loss gives him no claim whatever for compensation.<sup>1</sup>

The most ancient, and once, if not now, the most usual form of this voluntary sacrifice, was a jettison of the cargo to lighten the ship. It would be the same thing if the cargo is jettisoned in any way to relieve the ship, as to get at a leak for the purpose of stopping it.<sup>2</sup> It must be not only voluntary, but intended as a means of saving the remaining property; and unless this were the purpose of the loss, it gives no claim for contribution.<sup>3</sup> It may be

<sup>1</sup> *Ross v. The Ship Active*, 2 Wash. C. C. 241; *Lyon v. Alvord*, 18 Conn. 66.

<sup>2</sup> 1 *Magens on Insurances*, 160, Case IX. In a case here mentioned goods were taken out of a vessel which had sprung a leak at sea, and put on board other vessels, that the leak might be discovered and stopped. In consequence of this, she was enabled to prosecute and complete her voyage. The goods taken out were captured, and were contributed for in general average.

<sup>3</sup> That no loss or expense is considered and applied in general average, unless it was intended to save the remaining property, and unless it accomplished the object, see *Williams v. Suffolk Ins. Co.* 3 Sumner, 510; *Scudder v. Bradford*, 14 Pick. 13; *Nickerson v. Tyson*, 8 Mass. 467. Thus jettison, which in its largest sense signifies any throwing overboard, in its ordinary mercantile sense means a throwing overboard for the preservation of the ship and cargo. *Butler v. Wildman*, 3 B. & Ald. 402. If, therefore, at the time of sacrificing the cargo, there was no possibility of saving it, there is no contribution. *Crockett v. Dodge*, 3 Fairf. 190. Where goods on the deck of a propeller were on fire, causing imminent peril to vessel and cargo, and certain to be themselves consumed, and were thrown overboard, and the vessel and remainder of the cargo saved thereby, it was held to give no claim to contribution, because the loss could not be attributed to the jettison, as the goods were already of no value by reason of the certainty of their destruction by fire, and because for that reason they could not be regarded as voluntarily sacrificed. *Slater v. Hayward R. Co.* 26 Conn. 128. There must be an intent and an act prompted by and tending to a practicable, or at least a probable result, and not mere endurance or submission to uncontrollable necessity, in either case. *Daniels, J.*, in *Barnard v. Adams*, 10 How. 270. This principle was involved in a late case in New York, *Lee v. Grinnell*, 5 Duer, 400, in which the facts were the following: On the night of the 26th of December, 1853, the sails, masts, and spars of the ship *The Great Republic*, then lying at a wharf in the port of New York, accidentally caught fire, and such was the progress of the flames that their destruction was certain. The masts, &c. were accordingly cut away, and one of the questions which came before the court was whether this cutting away of the masts was a voluntary sacrifice, creating a loss to be contributed for in general average. Upon this question, *Hoffman and Duer*,

added, that it is unquestionably the duty of the master to enter in his log-book all the facts and circumstances of the jettison, with a sufficiently full detail of whatever constituted the necessity, as well as a distinct statement of the property jettisoned; although we do not suppose that a disregard by him of this duty would affect the rights or obligations of the parties interested.

It is not, however, necessary that the property should be intentionally destroyed.<sup>1</sup> It is enough that it is voluntarily exposed to

JJ., differed, the former holding the affirmative and the latter the negative. *Duer, J.*, was of the opinion that the loss of the masts and spars that were cut away when they were actually on fire, and their destruction was certain, and their value wholly gone, and when it was only by cutting them away that the fire could be so reached as to afford a hope that it could be extinguished, and the act was therefore a positive duty, and not a deliberate sacrifice, was a loss, not to be made good by a contribution, but to be borne exclusively by the ship and her insurers; in other words, was a particular, and not a general average. But *Hoffman, J.*, said: "There is much authority to show that the demand for contribution is not limited to cases where the voluntary act both commences and completes the destruction of the subject for which it is claimed. It extends to cases where accidental peril has begun, and the voluntary act has consummated, that destruction. . . . I apprehend, then, that although a fortuitous cause has begun the work of destruction of part of a ship, if a voluntary act completes it, and that act averts or diminishes the damage to the cargo and rest of the ship, there is ground for contribution; and that this rule is equally applicable, whether it is certain that the fortuitous cause would have destroyed that portion if left alone or not."

<sup>1</sup> An intention to consign the goods thrown overboard to inevitable destruction forms no part of the reason assigned by the Rhodian law for contribution. It is the motive for the act, in relation to the rest of the property, and not the intention of the jettison in relation to the fate of the thing sacrificed or exposed to danger, which gives rise to the law of contribution. *Caze v. Reilly*, 8 Wash. C. C. 303. This principle is directly involved in some cases of voluntary stranding. Thus in *Barnard v. Adams*, 10 How. 270, 304, the action was brought for contribution for the loss of a vessel belonging to the plaintiffs. It appeared that the vessel was in imminent danger of being driven on a rocky and dangerous part of the coast, where she would have been inevitably wrecked, with loss of ship, cargo, and crew, and this immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured. It was contended for the defendants, that as the stranding of the vessel was inevitable, and her master, in the ordinary exercise of his duty, directed her course to that part of the shore which he supposed to be the safest for the vessel, this act did not render the stranding a voluntary sacrifice, or entitle the ship-owners to contribution from the owners of the cargo in general average; that as the ship did no more than pursue that course which, independently of the good or evil thence resulting to cargo, was most safe for herself, she

a peculiar and extraordinary risk, with the purpose of thereby promoting the safety of the ship or of other parts of the cargo. Thus, if a part of the cargo, instead of being thrown into the sea, is, for the purpose of relieving the ship, put into boats to be taken to the shore, and is lost on the way there, this would give a claim for contribution, although it was hoped that the goods would reach the shore safely.<sup>1</sup> So goods taken out of a ship and put upon the beach to lighten her when stranded, if there damaged, furnish a claim for contribution.<sup>2</sup> But if in the common peril a part of the goods were put into the boats as the only way of saving them, and with no purpose of saving the rest of the property, and the boats were

could not be said to encounter a peril or incur a loss for the benefit of her cargo. But the court held that the right to contribution did not depend on any real or presumed intention to destroy the thing cast away, but on the fact that it has been selected to suffer the peril in place of the whole, that the remainder may be saved. In a subsequent case, that of *Sturgess v. Cary*, 2 Curt. C. C. 59, the vessel of the plaintiffs being in imminent danger of destruction by the action of the wind and sea, the master, after consulting with his officers, for the safety of the ship and cargo and the lives of those on board, slipped the cables and ran the vessel ashore on the beach. Great damage was done to the vessel, and heavy expenses were incurred in consequence in getting her off and repairing the damages. The ship-owners claimed of the owners of the cargo, by way of general average, their respective proportions of the damage, loss, and expenses so incurred, on the ground that these constituted a sacrifice incurred by the owners of the vessel for the common benefit of the vessel, cargo, and freight, and all interested therein. This claim the defendants resisted, on the ground that the damage, losses, and expenses were not incurred by any voluntary sacrifice of the vessel for the safety of the goods on board, but were occasioned remotely and immediately by the inevitable and irresistible force of the winds and waves. But this claim was allowed, the court saying: "It is quite true that the vessel, as well as the cargo, were in more danger of destruction while at some distance from the shore, and beating on the rocks, than by going on the beach; and that, in some sense, it cannot be said the vessel was sacrificed when she was relieved from the greater peril by being stranded. But in the sense in which this word is used in the law of general average, the stranding was a sacrifice. The fact that the peril impending over the ship and cargo would have destroyed both if not averted, so far from being inconsistent with a claim of this kind, is a necessary prerequisite to the voluntary act of the master; and what is denominated a sacrifice means, *not that its subject is destroyed, or even subjected to a greater danger than it was already in*, but that it is selected to suffer alone, and thus avert the common peril." The subject of voluntary standing will be considered more fully hereafter.

<sup>1</sup> *Lewis v. Williams*, 1 Hall, 437; *Stevens on Average*, p. 15.

<sup>2</sup> *Hennen v. Monroe*, 16 Mart. La. 449.

swamped, and the goods lost, there should now be, on the general principles of average, no claim for contribution, although the lightening of the vessel did in fact relieve her.<sup>1</sup> In practice, however,

<sup>1</sup> In *Whitteridge v. Norris*, 6 Mass. 125, the plaintiff shipped a keg of dollars on board a ship of which the defendant was master, to be carried to Calcutta. The ship, after her arrival in Bengal Bay, struck ground, and was thought to be in imminent danger of perishing. In this extremity the master and crew took to the boats and forsook the ship. They attempted to save some articles of the lading; and some kegs and bags of dollars, amongst which was the plaintiff's, were put on board the long-boat. The long-boat being found to be overladen, it became necessary for the preservation of the lives of the people on board to lighten it, and among the articles thrown overboard was the plaintiff's keg of dollars. The boat, with the people on board and the remainder of the articles taken from the ship, reached the shore in safety. The ship, on the following day, was regained by the master and crew, and not having suffered any material damage, was taken with the remainder of her cargo to Calcutta. The plaintiff claimed a contribution for his loss in the jettison from the boat. The questions submitted to the court were, whether the ship and the residue of her lading which arrived at Calcutta, or that part of the lading which was saved immediately in the boat, were liable to a contribution for the benefit of the plaintiff. It was held that as the master and crew, in taking to the boats, acted with no intention or purpose directed to the common preservation of the ship and cargo, and although the ship and cargo left on board arrived in safety, as their preservation was not owing to the dereliction of the master and crew, or to the unsuccessful attempt to save the plaintiff's adventure in the long-boat, the case, on the whole, had no requisite or circumstance of a case of contribution and average, as it respected the ship and cargo. It was held further, as to the few articles of the cargo which were brought to the shore in the long-boat, that although they were preserved in some measure at the expense of the plaintiff, yet, as the goods saved in the boat and those jettisoned from it were exposed together, in consequence of a previous peril, and for the purpose of saving what could be saved, without any concert or mutual design of the parties interested; as the people in the boat were justified in lightening it in order to save their lives; as the goods thrown out, for every purpose of the inquiry, and as to the rights and duties of the particular owners or freighters, were in no other situation than that of the goods left in the ship, so that if the ship had perished the event would have been precisely the same; and as, if the goods lost in the jettison from the boat had been left in the ship, the danger from overloading the boat would not have been incurred, the eventual safety of the ship, and the loss of the plaintiff's dollars in attempting to save them without any regard to the safety of the ship or of the other effects taken together into the boat, afforded no case of contribution or average. The court added, that "the requisites to a case of that nature are a contract, by which distinct properties of several persons become exposed to a common peril, and a relief from that peril at the expense of one or more of the concerned, who thereupon are entitled to a contribution from the rest; provided

it would generally be supposed that the goods were thus imperilled for the purpose of saving the property in the manner in which the loss of them did in fact relieve her, unless it was shown to be otherwise.

The word "jettison" is usually applied to the goods alone, but there may be a kind of jettison of parts of the ship. If the masts are cut away, or the sails and rigging cast off, or a cable cut and an anchor lost, or guns or provisions, thrown over, to save the ship and cargo from wreck, the loss must be averaged on the property saved.<sup>1</sup>

the benefit was intended as well as obtained for them, at the peculiar hazard or by the destruction of the property lost." See also *Benecke & Stevens on Av.* (Phil. ed.) p. 65; *Molloy*, Book 2, c. 6, § 12.

<sup>1</sup> *Walker v. U. S. Ins. Co.* 11 S. & R. 61; *Sims v. Gurney*, 4 Binn. 513; *Greely v. Tremont Ins. Co.* 9 Cush. 415; *Potter v. Providence Washington Ins. Co.* 4 Mason, 298; *Dig.* 14, 2, 2, 1; *Le Guidon*, c. 5, a. 21; *Laws of Oleron*, a. 9; *Cod. de Com.* l. 2, t. 11, a. 211; *Hennen v. Monro*, 16 Mart. La. 449; 3 Kent, Com. (5th ed.) 238. If a master, compelled by necessity, cut his cable from the anchor, that with it he may fasten the ship to the pier, its value must be made good by contribution. *Birkley v. Presgrave*, 1 East, 220. A freighter of goods is not bound to contribute his proportion of the price which the new masts cost, but is only responsible for his proportion of the value the masts had at the time they were cut away. *Teetsman v. Clamageran*, 2 La. 195. It is only particular average, if the mast is broken by the force of the wind, without the concurrence of man. But if, the wind having broken the mast, it is necessary to complete the fracture, and to cast the mast into the sea with sails and rigging, it is then a general average, for the value of the mast and accessories in the state the whole was in when broken. *Emerigon*, tom. 1, c. 12, § 41, p. 622. When, by an ordinary peril of the sea, a mast is broken, a boat detached, or a leak disclosed, such accidents are matter of simple particular average, to be borne by the owner of the ship, and not subjects for contribution; but if, during a storm, or a combat, it is found necessary, for the purpose of relieving the ship, or facilitating a manœuvre, to cut away a mast, or make any other sacrifice, that must be considered as a case of common general average. In combining these two rules, it results, that if a blast of wind had broken the mast, and then for the safety of the ship it was necessary to complete the fracture, and cast the mast, with sails and rigging, into the sea, that last measure would form a case for common contribution; and the amount would be determined according to the value of the mast and appendages at the time of the breaking produced by the accident. Before the determination to make the sacrifice, it was but a case of simple average. 3 *Pardeassus*, *Droit Commercial*, art. 737, 738. The imminence of the danger makes no difference; if a cable is voluntarily cut, and the vessel is afterwards saved, it is not less a general average charge that there was reasonable or even strong ground to believe that, without such cutting, the cable would have soon

## SECTION III.

## THE SACRIFICE MUST NOT BE CAUSED BY THE FAULT OF THE OWNER.

The sacrifice must be not only voluntary and intended, but not in any degree the fault of the owner. A familiar illustration of this may be found in the law concerning goods carried on deck. It is, as has been already stated, a general and an ancient rule of the law of shipping, that goods shall not be carried on deck.<sup>1</sup> The

parted. It was a voluntary act at the time it was done, and this gives it its character. *Greely v. Tremont Ins. Co.* 9 Cush. 419. Damage done to a vessel by cutting holes in the deck to pour down water to extinguish a fire is a proper item for contribution. *Nelson v. Belmont*, 5 Duer, 310. If the masts and rigging are carried overboard by the violence of the weather, but remain attached to the hull, and it becomes necessary for the preservation of the ship to cut them away, the damage caused by the act of so cutting them away is to be contributed for only to the extent of the value of the mast and rigging, when thus hanging by the side of the vessel. *Nickerson v. Tyson*, 8 Mass. 467; *Teetzman v. Clamageran*, 2 La. 197. See *Patten v. Darling*, 1 Clifford, C. C. 254. The owners of the cargo are liable to contribution for ship's stores necessarily thrown overboard after a vessel is captured, and while she is in the hands of an enemy. *Price v. Noble*, 4 Taunt. 123. The fact that the ship-owner is insured does not affect his right to recover general average. *Ibid.*

If, with a view to the general safety of ship and cargo, it becomes necessary to damage and destroy another ship, as, for instance, if a number of ships are lashed together, and one takes fire, and the crews of the others unite in scuttling the burning ship for the safety of the rest, the loss of the ship so destroyed is said by Mr. Arnould, citing in support of his opinion foreign authorities, to be a general average loss, to which all those saved thereby must contribute. 2 Arnould on Ins. 895. We should have some doubt of this. A ship on fire should not, generally at least, be scuttled, if the fire could be extinguished; and if she was scuttled, when she could not be saved, we should not call this a general average loss.

<sup>1</sup> Ord. Louis XIV., tit. Jet. a. 13; Code de Cour, a. 232; Emerigon, ch. 12, § 42, vol. 1, p. 623 (ed. 1827); Consolato del Mare, par Pardessus, c. 186; *Johnston v. Crane*, 1 Kerr, N. B. 356; *Lenox v. United Ins. Co.* 3 Johns. Cas. 178; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429; Bell's Commentaries on Laws of Scotland, vol. 1, p. 586; *Dodge v. Bartol*, 5 Greenl. 286; *Cram v. Aiken*, 13 Me. 229; *Taunton Copper Co. v. Merchants Ins. Co.* 22 Pick. 108; *Smith v. Wright*, 1 Caines, 43; *Hampton v. Brig Thaddeus*, 4 Mart. La. 582; *Doane v. Keating*, 12 Leigh, 391.

In England, by the Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107, §§ 170, 171, and 172, it is enacted, that before any clearing officer permits a ship wholly or partly laden with timber to clear from any British port in North

reasons for this are obvious ; not only is cargo there placed itself more liable to loss, because if waves swept the deck it would be washed over, but it would generally endanger both ship and cargo, as it puts the weight far from the keel, and by raising the centre of gravity, makes the ship less stable. It encumbers the deck, which might be a matter of grave importance in a storm.<sup>1</sup> Goods therefore ought not to be carried on deck ; if then, being carried there, they are jettisoned to save the ship and cargo from impending peril, this loss gives no claim for contribution.<sup>2</sup>

America or Honduras for any port in the United Kingdom, after September 1st or before May 1st in any year, he shall ascertain that the whole cargo is below deck, and give the master a certificate to that effect ; and the master shall not sail without such certificate, and shall not allow any part of the cargo to be upon deck (except in specified cases of necessity) ; and if the master sail without the certificate, or load in the mode forbidden, he shall forfeit £100.

<sup>1</sup> This must be at least generally true ; but in *Lapham v. Atlas Ins. Co.* 24 Pick. 1, it was held that the circumstance of carrying goods on deck, if it did not increase the risk, would not of itself avoid the policy, and that a general usage for the same species of vessels to carry deck-loads was competent evidence, in connection with the opinions of nautical witnesses, to show that, in fact, the risk was not increased by carrying the goods on deck.

<sup>2</sup> The master of a ship, who has signed the usual bill of lading, is not liable for a loss by the jettison of goods which had been laden on deck with the knowledge and consent of the shipper and consignee. *Johnston v. Crane*, 1 Kerr, N. B. 356. An insurance does not reach goods on deck, unless expressly mentioned. They are not considered as part of the cargo, in which the other shippers are interested. The owners of the cargo *under cover* ought not, therefore, to contribute to the jettison of the goods on deck. *Lenox v. United Ins. Co.* 3 Johns. Cas. 178. For goods shipped on deck and jettisoned there is no contribution. *Smith v. Wright*, 1 Caines, 43. The reason why, for goods laden on deck, neither contribution nor general average, in case of jettison, can be claimed, is, that they themselves increase the danger of the navigation, and are taken on board under an implied agreement that they shall be sacrificed, if it be necessary. Same case, in note, where goods are transported by water from place to place, a usage at such places to carry a certain description of goods on deck, after the hold is full, does not render the owner of a vessel liable to contribution for the jettison of such goods when laden on deck. And where, by the usage of the place, such goods pay the same freight when carried on deck as if carried in the hold, they are not entitled to the benefit of general average, when paying full freight, if they are laden on deck and lost by jettison. *Cram v. Aiken*, 13 Maine, 229. If it becomes necessary, from stress of weather or the dangers of the seas, to sacrifice the deck load for the common safety, this does not present a case for contribution or general average, but it is the particular loss of the master, when the goods were placed upon deck without the consent of the shipper. *The Paragon*, Ware, 335.



The rule, that the jettison of goods carried on deck gives no claim for contribution, is founded upon the reason that they ought not to be there; and wherever it is proper to carry the goods on deck, it might seem to be proper that the voluntary sacrifice of them should be contributed for. The propriety of so carrying them should be determined in any case, we think, by the custom.<sup>1</sup> The

See *Brooks v. Oriental Ins. Co.* 7 Pick. 259, and *Smith v. Miss. Ins. Co.* 11 La. 142.

<sup>1</sup> That the proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the ship-owner for a loss by jettison, see *Gould v. Oliver*, 4 Bing. N. C. 134. In the above case *Tindal*, C. J. says: "As to the authorities in the English courts, there is no one which states directly that goods laden on deck shall in no case be entitled to contribution. The question, whenever it has arisen in our courts, has been between the owner of the goods thrown overboard and the underwriter. And the rule generally established seems to have been, that, for goods so laden, the underwriters are not responsible." In a later case, before the Court of Queen's Bench, the owner of pigs carried on deck on a passage from Waterford to London, and jettisoned, recovered against the owners of the vessel for a contribution in general average. Thereupon the owners of the vessel claimed reimbursement against the underwriters in a time policy. It was held that if the usage justified the carrying of the pigs on deck, the underwriters were liable. *Milward v. Hibbert*, 2 Gale & D. 142.

In the case of *Da Costa v. Edmunds*, 4 Camp. 142, there was a policy of insurance upon forty carboys of vitriol. These carboys were placed on the deck and lashed to the ship's side. They were broken in a storm; the vitriol took fire, and the whole was necessarily thrown overboard. Lord *Ellenborough* left it to the jury to say whether it was usual to carry vitriol on the deck, and whether these carboys were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it *without any communication*, and all they could require was, that these carboys should be properly stowed.

In *Rogers v. Mechanics' Ins. Co.* 1 Story, 603, *Story, J.*, in speaking of the effect of usage upon the language of contracts, says: "It must be some known general usage or custom in the trade, applicable and applied to all the ports of the State where it exists; and, from its character and extent, so notorious, that all such contracts of insurance in that trade must be presumed to be entered into by the parties, with reference to it as a part of the policy."

In *Brown v. Cornwell*, 1 Root, 60, an action was brought for the average loss of five horses thrown overboard in a storm to save the vessel and cargo. The question before the court was whether stock shipped upon deck, in case it was thrown overboard to save the vessel and the rest of the cargo, would entitle the owners to an average upon the goods, &c. shipped in the hold of the vessel, that were saved. The court determined that it would; that although stock upon deck is more exposed to danger, and in a storm exposes the vessel to greater risk, than goods in the hold, yet, as it was the universal custom to ship goods in the hold

application of steam to the uses of navigation has given rise to some exceptions to the general rule excluding deck-loads from the benefits of general average. From the peculiar construction of steamships, one of the reasons of the rule, namely, that carrying goods upon deck increases the difficulty of navigating the ship, does not apply, or at least not with equal force; and, *cessante causa, cessat et ipsa lex*.<sup>1</sup>

with stock upon deck, when stock upon deck is thrown overboard for the express purpose of saving from destruction the cargo in the hold, it is but reasonable that the cargo saved should bear a proportion of the loss which was the price of its ransom.

<sup>1</sup> The first case in which this distinction was made was that of *Hurley v. Milward*, 1 Jones & C. 224, in the Court of Exchequer for Ireland, at Easter Term, 1839. This was an action for general average, against the owner of a *steam vessel*, by the owner of certain pigs which had been stowed upon deck and thrown overboard in a storm. In answer to an assertion of the defendant's counsel, that, according to every maritime code in Europe, property stowed upon deck is not the subject of general average, *Pennefather*, B., said: "That is a proposition laid down with respect to *sailing vessels*. The reason of it is, that goods stowed on deck obstruct the mariners in the navigation of the vessel. *In a steam vessel plying from port to port, that reason does not apply.*" This case was followed in the United States, in 1850, by that of *Gillett v. Ellis*, 11 Ill. 579. In this, after speaking of the general rule, the court say: "Propellers are a class of vessels but recently introduced in the navigation of the lakes, to which, from the peculiarity of their construction, and the general usage respecting them, this general rule is not applicable. They are double-deckers, with two holds. By the general custom prevailing in reference to them, goods stowed on the main deck, or upper hold, are regarded as under hatches, and as safe as those stowed in the lower hold, or where cargo in ordinary vessels is only considered as under cover. This individual usage, resulting from the character of the vessel, must govern the rights and liabilities of the owners of the vessel and cargo. The owner of goods which are stowed on the main deck of a propeller, and necessarily cast overboard by the direction of the master to preserve the vessel and crew, is, therefore, entitled to the benefit of a general average, as much as the owner of goods that are stowed in the hold would be, under like circumstances." In the case of *Harris v. Moody*, 4 Bosw. 210, Judge *Pierrepoint* says: "The old rule was established when all vessels were propelled by sails, and when there was no machinery in the hold of the ship; but the introduction of steam into marine service has wrought great changes in the situation of the motive-power, and has rendered the steamboat deck the fitter place for the stowage of cargo. The reason of the rule has ceased, and the rule should perish with the reason." The goods jettisoned in this case were on the main-deck of a steamboat, and not under cover; they were piled between the ladies' cabin and the side of the boat. The goods held liable to contribute were also on deck. This decision, given in the Superior Court of the city of New York, upon appeal was confirmed. 30 N. Y. 266. See also *Merchants' Ins. Co. v. Shillito*, 15 Ohio State, 559, to the same effect, and

It is a well-known custom for coasting vessels which make short trips along the shore to carry goods on deck. The vessels that bring lumber or hay from the Eastward to Boston and other ports have a custom of first filling the hold, and then building up the lumber or the bales of hay over nearly the whole deck and many feet high; and provision is made for raising the booms high enough upon the masts to swing clear of this deck-load.

We apprehend the rule should be, that wherever from the peculiar nature of the goods or of the voyage, or in fact for any reason, a custom exists to carry goods on deck, and this custom is well established and known, it would bind all the parties interested.<sup>1</sup>

It is, however, a somewhat difficult question, and has been much discussed, whether the owners of other parts of the cargo should be held to contribute for the jettison of goods carried on deck. Our notes will show that the weight of American authority

also *Toledo Co. v. Speares*, 16 Ind. 52, to the effect that goods upon the decks of sailing vessels are contributed for when jettisoned, provided there is a usage for their being so carried.

<sup>1</sup> The doctrine excluding goods carried on deck, and jettisoned, from the benefits of general average ought to be controlled by the usage of the trade, and accordingly contribution may be claimed for goods thrown overboard from the deck of small coasting vessels, or river craft, which usually carry a part of their cargoes on deck. Valin, *Ord. de la Marine*, art. 13.

That a commercial usage, having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it, is evidence of the intention of the parties, and illustrative of their agreement, see *Barber v. Bruce*, 3 Conn. 9; *Noble v. Kennoway*, 2 Doug. 510; *Vallance v. Dewar*, 1 Camp. 503; *Anderson v. Pitcher*, 2 Bos. & P. 164. See further as to the effect of custom, *Pickering v. Barkley*, 2 Roll. Abr. 248, pl. 10; *Lethulier's Case*, 2 Salk. 443; *Parr v. Anderson*, 6 East, 202; *Halsey v. Brown*, 3 Day, 346; *Coit v. Com. Ins. Co.* 7 Johns. 385; *Wadsworth v. Pacific Ins. Co.* 4 Wend. 37; *Toledo Co. v. Speares*, 16 Ind. 52; Valin, *Comment. sur L'Ord. tit. du Jet.* art. 13, vol. 2, p. 532 (ed. 1829). In cases of mercantile engagements, or in the construction of mercantile contracts, a general, practical construction which opposes no principle of law, but is agreeable to equity and fair dealing, has the force of law, the parties to such contracts always acting in reference to well-established and general usage. *Bedford Ins. Co. v. Parker*, 2 Pick. 8. "A reference to usage is fairly implied in contracts of a commercial nature, and is to be presumed, indeed, in the construction of contracts generally, when the conclusion is not avoided by special circumstances or stipulations." *Sewall, J.*, in *Clark v. United Ins. Co.* 7 Mass. 369.

appears to be against such a claim for contribution, while the weight of English authority is in favor of that claim.<sup>1</sup>

We cannot but think that the plain principle to which we have already adverted would suffice to determine all such questions. The ship-owner has no right to carry goods on deck, and the shipper of the goods has no right to have them placed on deck. This is the general rule ; and if one shipper has his goods on deck, and they are jettisoned, and he claims contribution of the other shippers of goods, they may well say to him, " You have, in the first place, violated the law of shipping, and have imperilled our goods by so doing, and we shall not make you any compensation for the loss of your goods."<sup>2</sup> But on the other hand, while the general rule certainly is that the shipper should not have his goods on deck, a custom may have given him a right to have them there. If the other shippers of goods did not know, and had no reason to know, this custom, they would not be affected by it ; but if the custom was so well established and so well known, that the shippers of the other goods must be presumed to have known it, they have no longer a right to deny the claimant's right to place his goods there. We think the English cases apply to and illustrate this principle.

The owner of the ship of course knew that the goods were carried on deck, for we should say, on this point, that the knowledge of his master was his knowledge ;<sup>3</sup> and if it was not right to carry them there, the ship was as much in fault as the shipper, and we know not why the ship should not contribute for their loss, if saved by their jettison. If a deck-load be thus jettisoned, and it was placed on the deck against the knowledge and consent of the shipper, the ship should however pay him, not by way of contribution, but for the wrongdoing of the ship.<sup>4</sup>

<sup>1</sup> See preceding note ; and as against the liability of insurer, *Lenox v. United Ins. Co.* 3 Johns. Cas. 178 ; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429 ; *Dodge v. Bartol*, 5 Greenl. 286 ; *Cram v. Aiken*, 13 Me. 229 ; *Doane v. Keating*, 12 Leigh, 391 ; *Smith v. Wright*, 1 Caines, 43 ; *Hampton v. Brig Thaddeus*, 4 Mart. La. 582 ; *Taunton Copper Co. v. Merchants Ins. Co.* 22 Pick. 108. And in favor of their liability, *Da Costa v. Edmunds*, 4 Camp. 142 ; *Gould v. Oliver*, 4 Bing. N. C. 135 ; *Milward v. Hibbert*, 3 Q. B. 120 ; *Brown v. Cornwell*, 1 Root, 60.

<sup>2</sup> *Lawrence v. Minturn*, 17 How. 114.

<sup>3</sup> *The Paragon*, Ware, 335 ; *The Rebecca*, Ware, 194.

<sup>4</sup> That the master, if he carries goods on deck, without the consent of the shipper, is personally responsible, and through him the ship, for any loss or damage the

The rule that, where the loss is occasioned by the fault of the owner, there is no claim for contribution, has been applied to the case of a boat being cut away. There have been quite a number of cases on this subject. If a boat hangs at the stern or at the quarters of a vessel from the davits, it is easy for a sea which comes aft to fill the boat, and her weight may break her fastenings or the davits, and then the boat is lost. But neither the fastenings nor the davits may give way, and then the boat, being full of water, presses down the stern. This may be an added peril which it may be necessary to remove at once, and for this purpose the fastenings are cut and the boat is lost. Then the questions arise, Is this a voluntary sacrifice calling for contribution? <sup>1</sup> We think that this question must be determined by the further one, Was the boat properly in that place or exposed to that peril? <sup>2</sup> And again,

goods may sustain from being thus exposed; and if it becomes necessary, from stress of weather or the dangers of the seas, to sacrifice the deck-load for the common safety, this does not present a case for contribution or general average, but it is the particular loss of the master, it having been occasioned by his own fault; see *The Paragon*, Ware, 335. The case of *The Waldo*, Daveis, 161, was an action *in rem*, brought against the ship for the loss of a quantity of potatoes which were carried upon deck without the consent of the shipper, and perished from the exposure there received. The court say: "They were undoubtedly lost by sea damage, and although the dangers of the seas are excepted by the bill of lading, the master, by carrying the goods on deck, waives the exemption in his favor, and takes the responsibilities of sea damage upon himself, at least of any damage that would not have happened to them if they had been secured under deck." Where nothing is said in the bill of lading as to the manner of stowing the goods, whether on or under the deck, the legal import of the contract, as well as the usage and understanding of merchants, imposes upon the master the duty of putting them under deck, unless otherwise stipulated. *Creery v. Holly*, 14 Wend. 26. See also *The Rebecca*, Ware, 188; *Stinson v. Wyman*, Daveis, 172; *The Sch. Reeside*, 2 Sumner, 567; *Waring v. Morse*, 7 Ala. 343; *Dorsey v. Smith*, 4 La. 211; *Sayward v. Stevens*, 3 Gray, 97; *Gardner v. Smallwood*, 2 Hayw. N. C. 349. If the stowage upon deck did not occasion the loss, the owner of the ship will be no more liable for damage to that part of the cargo than to the rest. *Gardner v. Smallwood*, 2 Hayw. N. C. 349.

<sup>1</sup> The ship's boat, being a necessary part of the ship's furniture, and being cut away for the general benefit, is properly brought into general average. *Lenox v. United Ins. Co.* 3 Johns. Cas. 178.

<sup>2</sup> When boats are obliged to be cut away from the ring-bolts to which they are fastened upon deck, and thrown overboard, it cannot be doubted that their value is to be allowed for in general average. But if, by negligence, they were left outside the vessel, or hung to the davits over the ship's stern, the room approp-

this question must be determined by the custom. There is no such rule here as in respect to the deck-load. It seems to be to a great extent left to the discretion of the master. Some insurers refuse to pay for the loss of a boat thus placed, believing it an unsafe practice, and being disposed to induce more caution. Others pay for it; for, while the boat is certainly safer on deck, it can hardly be said that this degree of caution is positively and peremptorily required of the master. There are certainly vessels, as whaling ships, for example, which always do and perhaps must carry boats on the stern or elsewhere outside the vessel. Men-of-war, perhaps, always do, and very large merchant ships which require many boats usually carry some of them so. It is said by Emerigon that, in the commerce of the Mediterranean, boats so carried and lost were paid for, because if they were so carried it was easier for the crew to escape if the vessel were seized by corsairs.<sup>1</sup> And it may obviously be convenient to carry a boat where it may readily be dropped into the water to save life or property. From considerations of this kind, perhaps, the Supreme Court of Massachusetts decided that, where underwriters refused to pay for a boat so lost, the burden of proof was on them to show that she was improperly carried in that way.<sup>2</sup>

#### SECTION IV.

##### THE LOSS MUST NOT BE CAUSED BY A MERE PERIL OF THE SEA.

That the loss must be voluntary to found a claim for contribution is certain, and we have seen that a voluntary exposure to peril which might have been avoided, if by this peril the thing so exposed is lost, creates a claim for contribution. But it is sometimes very difficult to determine whether such an exposure was one of the common risks of navigation, or a voluntary sacrifice. For example, a vessel is in danger of wreck upon a lee shore, or capture by an enemy. She hoists all sails and takes the risk

priated for them on deck being filled with goods, it is proper that no compensation should take place. *Benecke on Ins.* 187.

<sup>1</sup> 1 Emerigon, ch. 12, § 41.

<sup>2</sup> *Hall v. Ocean Ins. Co.* 21 Pick. 472.

of their loss to avoid the greater peril; the sails and spars are blown away, but not until she has gained such a distance as to enable her to escape; are the sails and spars thus lost to be contributed for?<sup>1</sup> Authorities of great weight say they are, and this is perhaps the general rule on the continent of Europe.<sup>2</sup> But it is a little difficult to bring the case within the principles of general average. The sails and spars are provided for this very purpose, and should be adequate to this necessity. If they are weak from age or original imperfection, this is the fault or misfortune of the ship. It is, however, always possible that sails, spars, and cordage may be entirely seaworthy, and yet there may be occasions for exposing them to a pressure far beyond what they are calculated to sustain; and if they are lost, and the ship and cargo saved thereby, it may well be asked, why should not the cargo contribute?

As another instance of a voluntary sacrifice, goods being a part of the cargo are sometimes given to pirates or captors by way of ransom, and to obtain liberation of the ship and the residue of the cargo. They are as much sacrificed for the general safety as though they were jettisoned.<sup>3</sup> But if they are forcibly taken by

<sup>1</sup> The damage occasioned to the ship and tackle by standing out to sea with a press of sail in tempestuous weather, the press of sail being necessary in order to avoid an impending peril of being driven on shore and stranded, is not the subject of general average. *Power v. Whitmore*, 4 M. & S. 141. All ordinary losses and damage sustained by the ship, happening immediately from the storm or perils of the sea, must be borne by the ship-owners. But all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably as general average. *Birkley v. Presgrave*, 1 East, 220. See also *Covington v. Roberts*, 5 Bos. & P. 378; 2 Phil. on Ins. 80, 82; *Benecke on Ins.* 187; 1 Mag. 345, Case 27; *Shiff v. La. State Ins. Co.* 18 Mart. La. 629.

<sup>2</sup> Valin, *Ord. de la Mar. tit. du Jet.* art. 1, p. 189; Boulay Paty, *Com. de Droit, Com. Mar. tit. 12, § 2*, p. 446; Prussian Ord. § 1824; Emerigon, ch. 12, § 41, p. 622.

<sup>3</sup> Where a ship, hired and loaded by a neutral, was captured on suspicion of carrying enemies' property, and libelled as a prize, and a compromise was effected by the hirers giving the captors a bill of exchange, indorsed by the master of the vessel, it was held that the ship-owners were liable to the hirer, on payment of the bill, as for an average on the vessel and cargo at the time and place of incurring the expense. *Douglas v. Moody*, 9 Mass. 548. Where the supercargo of a ship, captured and libelled as prize, made a reasonable compromise with the captors, giving up a part of the property and retaining the remainder, it was holden that the underwriters on the cargo were bound by such compromise.

the captors, the entire absence of voluntariness prevents any claim for contribution.<sup>1</sup> So if money or goods are jettisoned to prevent the enemy from obtaining them; here the sacrifice is voluntary,

*Welles v. Gray*, 10 Mass. 42. Whatever a master may have agreed to pay for the ransom of his ship and cargo to any privateer or pirate, when taken, constitutes a general or gross average. 1 Mag. on Ins. 64. Where the master made a compromise with the captors, abandoning the ship and cargo to them, and being paid one fourth of their value, it was held to be binding upon the insurers, the court affirming that there was no ground for a distinction between a composition by which the subject, or a portion of it, should be specifically restored, and an equivalent given for the subject itself. *Clarkson v. Phoenix Ins. Co.* 9 Johns. 1.

Ransom to a public enemy is prohibited in England by statute. 22 Geo. 3, c. 35; 35 Geo. 3, c. 66, s. 37-39; 43 Geo. 3, c. 72, s. 16, 17; 45 Geo. 3, c. 72, s. 16. In *McMasters v. Shoolbred*, 1 Esp. 237, the ship was taken by a French frigate and carried into Charlestown, N. A., and there sold upon the authority of the French consul. The plaintiff, in the latter case, contended that the ship having been captured, and sold by the captors, after being a month in their possession, was a total loss, for which he was entitled to recover. Lord *Kenyon* held that it was impossible to make this more than an average loss; that it had been decided that if a ship had been sunk and weighed up again, if it was restored to the owners, they had only a right to go for an average loss, and that such also was the case of ransoms; that the owners had therefore a right to recover only so much as was the amount of the injury their property had sustained, which was an average loss.

Lord *Kenyon*, in *Havelock v. Rockwood*, 8 T. R. 268, speaks of the purpose of the laws against ransom. He says: "I think it an important observation, made by the defendants' counsel, that, in order to procure a legal sentence of condemnation in an enemy's port, the ship must have traversed the high sea where there was a chance of a recapture by our own cruisers, in which case the owner might have had his ship again on paying salvage. These ransom acts must be considered as remedial laws; and in the construction of such acts, it is the rule to extend the remedy so as to meet the mischief, and I think that the legislature intended, in passing these acts, to prevent such a transaction as the present taking place, *because it would take away the chance of a recapture.*" The captain's being a part owner will not render a compromise, made *bonâ fide*, and for the best interest of all concerned, less binding upon all parties, his acts being considered as done in his character of agent of all concerned. *Waddell v. Col. Ins. Co.* 10 Johns. 61.

<sup>1</sup> *Nesbitt v. Lushington*, 4 T. R. 783; *Hicks v. Palington*, F. Moore, 297; Dig. 14, 2, 2, 3; 1 Mag. on Ins. 64; *Beawes*, *Lex Mercatoria*, p. 149, tit. Gen. Av.; *Sheppard v. Wright*, Show. P. C. 18.

If after such a seizure the vessel is stranded, and part of the cargo taken by the captors at their own price, the loss cannot be recovered as for a general average; but for such part as in consequence of the stranding is damaged and thrown over-board, the insured may recover on a count stating the loss to be by stranding. *Nesbitt v. Lushington*, 4 T. R. 783.



but not intended for the benefit of other property, and consequently it is not a general average loss.<sup>1</sup>

Salvage not only where paid to recaptors, but in other cases, being for the benefit of all persons concerned in ship, cargo, and freight, falls within the rule of general average.<sup>2</sup>

<sup>1</sup> *Butler v. Wildman*, 3 B. & Ald. 398.

<sup>2</sup> *Spafford v. Dodge*, 14 Mass. 66; *Sansom v. Ball*, 4 Dall. 459. The principle of allowing a general average contribution for the expenses of salvage is not confined to cases of recapture. Where a vessel was stranded and lost, except a few materials, but the cargo was saved, it was held that the expenses of salvage were general average, and that the insurers on the cargo were bound to pay their proportion of such average. *Heyliger v. New York Ins. Co.* 11 Johns. 85. In *Briggs v. Merchants Ass. Co.* 13 Q. B. 167, a vessel, *The Joseph Alexander*, with cargo on board, abandoned by her crew at sea, was brought into harbor by salvors. The plaintiff, who was owner of the ship, applied to the Court of Admiralty, and obtained possession of the ship and cargo on entering into recognizance as a security for the whole salvage; and he effected an insurance intended to cover the proportion of the salvage he might have to pay under the recognizance. In the policy the subject-matter of insurance was described as "average expenses per *Joseph Alexander*." The vessel then sailed, and was totally lost with the cargo on board. The plaintiff was obliged to pay the amount of his recognizance, and brought this action against his insurers. It was held that the cargo was liable to contribute a ratable portion of the salvage, and that the plaintiff, who had become liable to pay the whole salvage, had a lien on the cargo for that ratable portion, and had consequently an insurable interest in the cargo.

In *Peters v. Warren Ins. Co.* 1 Story, 463, 468, Mr. Justice *Story* makes a distinction between salvage and general average as follows: "General average is commonly understood to arise from some voluntary act done, or sacrifice or expense incurred, for the benefit of all concerned in the voyage or adventure; and then it is apportioned upon all the interests which partake of the benefit. But the mere fact that an apportionment is made of a loss between the different parties in interest, if the loss itself does not arise from some act done, or sacrifice, or expense voluntarily incurred, for the common benefit, does not make it necessarily a case of general average by our law. Salvage is properly a charge apportionable upon all the interests and property at risk in the voyage, which derive any benefit therefrom. But, although it is often in the nature of a general average, it is far from being universally true that in the sense of our law, all salvage charges are to be deemed a general average. On the contrary, these charges are sometimes a simple average, or partial loss. We must, therefore, look to the particular circumstances of the case to ascertain whether it be the one or the other."

## SECTION V.

## OF THE CONSEQUENCES OF A SACRIFICE.

Where the sacrifice is voluntary and in all other respects one which calls for contribution, the loss to be contributed for may not be confined to the immediate damage or destruction which was intended or anticipated, for it extends to all those consequential damages which are caused directly by the voluntary act, and by that alone.<sup>1</sup>

<sup>1</sup> In *Sims v. Gurney*, 4 Binn. 513, 527, where a ship in distress, in attempting to go ashore near Cape May, struck on a ridge about four miles from it, but was afterwards taken off by the winds and currents, and brought to the shore near the Cape, it was held that not only the damage sustained on the ridge, but also at Cape May, must be the subject of general average, because the damage at Cape May was the necessary result of running on the ridge. Where a ship was stranded, and in order to relieve her the cargo was put into lighters and forwarded, and during the passage a portion of it was damaged, it was held that such a loss was a subject of general average, as the goods were exposed in the lighters for the general benefit, and as the damage was a direct consequence of such exposure. *Lewis v. Williams*, 1 Hall, 430, 451. In *Bond v. The Superb*, 1 Wallace, Jr., 355, it was held that the removal of part of a cargo of perishable fruit in a port of necessity, for the purpose of repairs, which increased an incipient decay, and hastened a partial destruction of the fruit, did not give the owner of the cargo a claim for general average. We give the opinion of the court in full. It is as follows: "Where goods are liable to loss or deterioration which arises solely from an inherent principle of decay or corruption, the owner cannot claim for general average, notwithstanding the delay of the vessel in the port of necessity may have added greatly to that deterioration. And this for two reasons: first, because there would be an equality between the owners of perishable goods and those not perishable; and second, because the immediate cause of damage is what the French writers term *vice propre* of the article, and not a damage incurred or sacrifice made either intentionally or incidentally for the safety of the whole. And perhaps a third reason might be added, to which the facts of this case would seem to give weight, and which has caused the memorandum clause in policies of insurance. I mean, because, such commodities carrying within themselves the seeds of deterioration, it is difficult, if not impossible, to discriminate the partial injury induced by inherent causes from such as might arise within the risks undertaken. It is true that where the direct and immediate cause of the damage to perishable articles is some act done for the general preservation, the owner would have the same right to claim for general average as if the goods had not been in their nature perishable. Such a case is found in *Maggrath v. Church*, 1 Caines, 196, where the damage sustained by some

Thus if goods of great value were brought on deck and left there for the purpose of getting out for jettison other less valu-

corn was occasioned by water that got upon it, 'in consequence of the cutting away the mast of the vessel for general preservation'; and thus the immediate cause of the damage was not the *vice propre* of the grain, but water which had got upon it by cutting away the mast. The circumstances of the case before us are different. No direct injury was received by the fruit in consequence of unloading and reloading it. The decay of the fruit had commenced before its removal; and assuming that its removal did accelerate and increase the natural progress of decay more than its pitching in the hold of the vessel would have done, still, it could hardly be said that the removal was the proximate cause of the decay, and not the *vice propre* of the fruit. Yet it is the proximate cause to which the law looks. 'It were infinite,' says Lord Bacon, 'for the law to judge the causes of causes, and their impulsion one on another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.' Now if the mere delay which would undoubtedly increase the damage to these perishable articles when it had once commenced is no reason why the damage, whose immediate cause is the *vice propre*, should not be brought into general average, we can see no reason why the removal which may have increased, not caused the injury, should have a different doctrine applied to it." Where a part of the cargo was thrown overboard for the preservation of the ship and lading in a storm, in consequence of which the residue was greatly deteriorated, it was held that the insured was entitled to contribution for the corn thrown overboard, but that the insurer was protected by the memorandum excluding from average articles perishable in their nature from any loss on what remained in specie, although it had been reduced by sea damage to less than half its value. *Saltus v. Ocean Ins. Co.* 14 Johns. 138. Where goods are injured in consequence of a jettison, the burden is on their owner to show that the damage was thus occasioned. *The Brig Mary*, 1 Sprague, 17. If a vessel from perils of the sea is compelled to seek a port of safety, and there the cargo is necessarily landed and stored in order to repair the vessel and to enable her to proceed on her voyage, and while thus stored is destroyed by fire, it must be paid for in general average. *Ibid.* But if the cargo was landed and stored because it was damaged, or if both these causes for landing and storing the cargo concur, and it is destroyed by fire while thus stored, it is not to be paid for in general average. *Ibid.* The injury which the goods lying close to the pump receive by openings cut into the vessel to convey the water standing upon deck to the pump must be compensated for in general average. *Benecke, Pr. of Indem.* 190; *Weijtsen*, § 16. If a vessel was exposed for the common safety, and the exposure was successful in relation to a part of the cargo, it is immaterial whether her total loss was produced immediately by the stranding, or consequentially by placing her in a situation which effected her destruction, in order to justify a claim to contribution. *Caze v. Reilly*, 3 Wash. C. C. 298. See also *Maggrath v. Church*, 1 Caines, 196; 1 Mag. 65; *Molloy*, vol. 2, ch. 6, § 8; *Abbott on Shipping*, 476 (6th Am. ed.).

able goods which had been stowed beneath them, and the goods first taken out were washed overboard or damaged by the sea, this would be, we think, a general average loss.<sup>1</sup> Or if water, thrown into a ship's hold to extinguish fire, damaged goods there, this damage would also be a general average loss.<sup>2</sup>

Cases of this kind require the application of a principle of frequent use, but often very difficult in its application. *Causa proxima non remota spectatur*. It may be said that, if the consequential damages are direct, they must be contributed for; not so if they are indirect. And then the question occurs, when is the cause *proximate* to the effect, and when is it *remote* from it.<sup>3</sup> Here we will only say,

<sup>1</sup> See Benecke on Average, p. 178.

<sup>2</sup> Only that part of the cargo should be contributed for which can be shown to have been damaged exclusively by the water. The rest of the cargo is to be assumed to have been damaged by the fire, if not proved to have been damaged by the water, and is not to be allowed for. *Nelson v. Belmont*, 5 Duer, 310. Where a vessel, being on fire, was scuttled as the only means of saving her, it was held that the scuttling was a voluntary act, and the losses that resulted proper subjects for contribution, and, consequently, that every loss to ship or cargo that could be distinctly traced to the scuttling, as its proximate cause, was to be contributed for in general average. *Lee v. Grinnell*, 5 Duer, 400. In *Nimick v. Holmes*, 25 Penn. State, 366, the distinction between the goods already on fire and the rest of the cargo was not noticed, and it was held that all which were damaged by water were to be contributed for. In the case of a voluntary sacrifice of a cargo of lime, for the preservation of the vessel, by scuttling her, the court held that the owners of the cargo had no claim against the owners of the ship for contribution on the principle of general average, if at the time of the sacrifice of the cargo there was no possibility of saving it. *Crockett v. Dodge*, 3 Fairf. 190. Mr. Justice Story, in *Col. Ins. Co. v. Ashby*, 13 Pet. 340, puts a supposed case which indicates a different opinion on his part from the above. He says: "Suppose a cargo of lime were accidentally to take fire in port, and it became necessary, in order to save the ship, that she should be submerged, and the cargo was thereby totally lost, but the ship was saved with but a trifling injury; would it not be a case of contribution?"

<sup>3</sup> In *Potter v. Ocean Ins. Co.* 3 Sumner, 41, Mr. Justice Story speaks as follows upon this subject: "If the bark had become wholly unmanageable, and innavigable from the immediate effects of the storm, I do not well see how the direct results from that unmanageableness and innavigability are to be treated otherwise than as a part of the loss. The storm is still the *causa proxima*. In causes of this sort it will not do to refine too much upon metaphysical subtilties. If a vessel is insured against fire only, and is burnt to the water's edge, and then fills with water and sinks, it would be difficult, in common sense, to attribute the loss to any other proximate cause than the fire, and yet the water was the principal cause of the submersion. If a vessel be insured against barratry of the master

that we know no principle which can help to answer it, but that which considers the cause to be *proximate* to the effect when no other cause must intervene to give effect to the first cause. We usually translate *remota* by *remote*, but *remota* means rather *removed*; and in the Latin rule cited, we suppose it to mean that the cause is removed from the effect when another cause comes in and more immediately works the destruction.

This rule requires certainly, as to the law of general average, this qualification, namely, that the original cause is still considered *proximate*, although an intervening and more active cause comes into play and immediately produces the loss, provided this intervening cause comes in naturally if not inevitably. As an example of this, we may refer to the case already stated, of goods taken from a laboring ship and put into a boat to be taken on shore and lost by wind or wave on the way to the land.<sup>1</sup> Here the only voluntary act is to put the goods safely into the boat, and the only intent is to send them safely to the shore. But, by doing this, a natural and obvious danger is incurred, which actually works their destruction. Another case which may illustrate this remark is one where, a mast being cut away, this made an opening by which water was let into the hold, and damaged the cargo; and this damage was held to require contribution.<sup>2</sup>

In a recent case in Massachusetts, a vessel laden with ice, was dismasted in a storm, and it was necessary in order to put in a new mast, to take out the stump of the old mast. The air thereby gained admission to the hold and the ordinary waste of the ice was increased. The court held that the loss of the ice was a case of general average.<sup>3</sup>

and crew, and they fraudulently bore holes in her bottom, and thereby she sinks, in one sense she sinks from the flowing in of the water; but, in a just sense, the proximate cause is the barratrous boring of the holes in her bottom." See also *Peters v. Warren Ins. Co.* 14 Pet. 99; *Bond v. The Superb*, 1 Wallace, Jr. 355; *supra*, p. 363, n. 1.

<sup>1</sup> *Lewis v. Williams*, 1 Hall, 430; Cod. de Com. b. 2, tit. 11, n. 238; Dig. 14, De Leg. Rhod.; Emerigon, ch. 12, § 41, vol. 1, p. 599.

<sup>2</sup> *Maggrath v. Church*, 1 Caines, 196. *The Brig Mary*, 1 Sprague, 17; *supra*, p. 363, n. 1.

<sup>3</sup> *Gage v. Libby*. The decision is not yet published. But the rescript sent down in December, 1867, is as follows: "The ice melted and lost by admitting the air into the hole where the mast was taken out for the purpose of making the necessary repairs was a subject of general average."

An analogous question would arise where a ship, to avoid capture or wreck, casts anchor upon a dangerous bottom, and the cable is chafed or cut by the rocks, or the anchor inextricably wedged among them, and so is lost. Is the loss of the anchor a general average loss?<sup>1</sup> The distinction has been taken by writers that it can be so only when the anchor was dropped in an unusual place. We think this fact might be evidence that it was dropped there from some unusual necessity, but we should doubt whether in any case this loss could be brought clearly within the principles of general average.<sup>2</sup>

<sup>1</sup> Benecke, *Pr. of Indem.* says, p. 190, that the damage which the goods sustain in consequence of a vessel's crowding sail is nowhere allowed in general average; and that the loss of anchors and cables, which, upon extraordinary occasions, are not cut, but in some other way exposed and lost for the preservation of the whole, greatly resembles that occasioned by crowding sail, as when a vessel, in order to avoid cliffs and shoals or a lee shore, casts anchor upon a stony ground. See *Weeskett*, tit. *Gen. Average*, n. 3.

<sup>2</sup> *Magens* states it as his opinion, that the insurers are liable for whatever loss or damage may accrue to a ship by the master's extraordinary endeavors for her preservation; that if, for instance, to avoid or escape from an enemy, a ship anchors in an open road, under the protection of some castle, and there parts her cable, it ought, doubtless, to be considered as a gross average, and that if the master of a ship, finding her too near a lee shore, apprehends that to save his vessel he must carry so much sail as to risk the carrying of his masts by the board, and, to save them, deliberately comes to an anchor, and a cable is lost, if it is not to be considered as a gross average, it ought at least to be made good by the insurers upon the ship. He adds that a regulation to this effect was made in Hamburg, in 1725, and that *Quintin Van Weysten*, a writer of great authority, in a treatise written about 1563, held that if the master of a ship had advisedly dropped anchor in rocky ground for her safety, then the breaking or losing of his anchors and cables, though it could not properly be deemed a gross average, ought to be recompensed as a good piece of service. *Magens* continues as follows upon the subject: "We remember also that at London, in certain cases, where it was proved that ships, endeavoring to keep clear of a lee shore, had new sails blown away and cables parted by anchoring in open sea, to avoid driving ashore, the losses being occasioned by striving to preserve the whole, were made good by the insurers, whose interest it always is (as well as for the common advantage) to make it the master's interest to spare nothing, in such extraordinary cases, to save the ship from stranding, by carrying out fresh cables when others have parted. If a master, being himself a part-owner in the ship, and fully insured, knows that he shall not be paid for the first cables he may carry out and lose by their breaking, he is discouraged from risking others, though with the appearance of saving his ship, as he may think it more for his advantage to let her go ashore on the first cable's parting, because the insurers must then pay him the full insur-

So it must be said that, if a vessel cuts and loses her cable, this may or may not be a general average loss, according to circumstances. If cut only because she cannot weigh her anchor, and must pursue her voyage, it is not a general average; but it is so if the cable were cut to avoid extreme and imminent peril of capture or wreck.<sup>1</sup> It may be added, that it is undoubtedly the duty of the master, who cuts or unshackles his cable, to attach to it, if he can, buoys, or use other means to facilitate recovery. If he failed to do this without excuse, and it appeared that the cable was lost because simple and ordinary precautions, entirely within his reach, were neglected, we should say this could not be called such a sacrifice from necessity as constituted a claim for contribution.

Such cases as these, of anchors, boats, or canvas lost, bring up at once a question frequently recurring through the whole law of general average. It is whether the loss was a mere incident to navigation, and was caused by one of the common perils to which ships are always exposed, or was a voluntary sacrifice to escape an extraordinary danger. It is not always easy to answer this question; but of the principle which must decide it, there can be no question. For it is certain that only when there is an extreme danger common to all the property, and a part of the property is destroyed, either directly and purposely, or by a danger to which it must now be exposed to save the rest, but which was never originally intended, only in such a case as this can the loss be consid-

ance; whereas, if she were saved by veering out other cables, he would lose the value of those anchors or cables that were lost or broke before. We must add that, as it is for the common good, and for the particular interest of all insurers, that ships should not go to sea without good cables, sails, &c., those cables that are not sufficiently strong for a ship to ride with in the usual loading-places, or any sails blown to pieces by stormy weather in the common course of a voyage, should not be paid for by the insurers, as it might be an incitement for masters not to go without good ones." *Magens on Ins.* pp. 52, 53, 54. See also *Weijtsen*, § 11.

<sup>1</sup> Cables cut away or anchors slipped to avoid being separated from convoy are not the subject of general average contribution in England, though they are so on the Continent. 2 *Arnould, Ins.* 894; *Stevens on Average*, 14 (5th ed.); *Emerigon*, ch. 12, § 41, vol. 1, p. 605 (ed. 1827). It was decided by the maritime judges of Amsterdam, in the year 1661, that if a cable is cut in a storm in order to save the ship, whereby the anchor is lost, the cargo is not bound to contribute, because there was no voluntary jettison. 2 *Bynkershoek, Quaest. Jur. Priv. l. 4, c. 24*, p. 424.

ered a general average loss.<sup>1</sup> This may be illustrated further by the following two cases. A ship being armed gives battle to a pursuing enemy and beats her off; the loss she sustains in the battle constitutes no average claim; the ship only discharged her duty, which was to carry the goods to their destination if possible. The loss was cast upon her "by the fortune of war," and must rest where it fell.<sup>2</sup> But where a vessel, pursued by an enemy, lowered

<sup>1</sup> See *Covington v. Roberts*, 5 B. & P. 378. Loss by shipwreck or a peril of the sea is not the subject of general average; but a loss incurred in order to save a vessel from shipwreck or a peril of the sea is. *Lyon v. Alvord*, 18 Conn. 75. If the damages to the ship arise from the ordinary occurrences of the voyage, and not from some extraordinary violence or peril to which she has been exposed, the loss must be borne by the owner of the vessel, who engages, by his contract with the freighter, that she shall be stout, stanch, and strong, and properly equipped for the voyage; and, whether it be expressly stipulated or not, he is bound to keep the vessel in this condition during the voyage, unless prevented by some extraordinary peril, for which he can in no respect be responsible. *Ross v. The Ship Active*, 2 Wash. C. C. 241.

<sup>2</sup> In *Taylor v. Curtis*, 6 Taunt. 608, which was an action to recover contribution for the expenditure in ammunition in resisting capture by a privateer, for the damage done to the ship in the combat, and for the expense of curing the wounded, *Gibbs*, C. J., said: "The losses, for which the plaintiffs seek to recover this contribution, are of three descriptions: first, the damage sustained by the hull and rigging of the vessel, and the cost of her repairs; secondly, the expense of the cure of the wounds received by the crew in defending the vessel; thirdly, the expenditure of powder and shot in the engagement. . . . The measure of resisting the privateer was for the general benefit, but it was a part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them, and there it seems to me they ought to rest. It therefore follows that these losses were not of the nature of general average, and that the plaintiffs cannot recover." Upon this subject *Benecke* says: "It is a question not easily to be decided, whether the damage done to a vessel by the defending her against privateers or pirates belongs to particular or to general average. . . . Now if cables be cut, goods cast overboard, or the vessel run ashore, in order to escape from the enemy, the damage is universally admitted to be general average. But as these measures are intended for the preservation of the whole, so is the defence of the vessel; and it seems unjust that the loss arising from it should fall only upon one party, particularly upon the ship-owner, while the benefit accrues to the whole. It is certain that the damage occasioned by the enemy's shot is one proceeding from external causes, and against the will of the captain; but it is nevertheless the consequence of a determination to resist, and may therefore be looked upon as a damage voluntarily sustained." *Benecke on Mar. Ins.* 231 (ed. 1824). *Benecke* also mentions that the Hamburg Ordinance reckons as general average all the damage



her boat into the sea with a lantern at the mast-head and sails set, and thus deceived the enemy and escaped, the value of the boat was contributed for.<sup>1</sup>

So, while the common expenses of convoy are not a general average loss, it has been said that where this convoy or other similar protection was made necessary by some unexpected and extraordinary peril, the cost would be a general average loss.<sup>2</sup>

So, if masts are blown overboard, they certainly constitute no general average loss; but if they float by the side, hanging to the ship, and are then cut away because they embarrass the navigation of her, it has been said that the loss is now one of general average. We do not see a sufficient reason for this. If contributed for at all, it can only be on the value they possess when thus cut away, and we can hardly suppose a case in which this value would be anything.<sup>3</sup>

done to the vessel, her apparel, and the cargo, by good defence against enemies, privateers, or pirates, but excludes the ammunition expended in the defence; that the expense of ammunition, on the contrary, is specially included by the Prussian Ordinance; and that the Hamburg, Swedish, Prussian, Danish, and Spanish laws admit to general average the charges of healing and attending the wounded in an engagement, and also allowances to widows and orphans of the killed.

<sup>1</sup> Emerigon, tom. 1, p. 622 (Meredith's ed.), 480.

<sup>2</sup> Emerigon, tom. 2, ch. 12, § 41, p. 626; 2 Arnould, 913; Bynkershoek, Quaest. Priv. Jur. l. 4, c. 25; Benecke & Stevens on Av., Phillips's ed. 147, 151. And it has been held that, where a vessel meets with an accident at sea, and is obliged to go into port, and another vessel accompanies her for the common good, and is paid for this, it is a general average expense. *Nelson v. Belmont*, 5 Duer, 310. It is stated by Mr. Stevens (Benecke & Stevens on Av., Phillips's ed. p. 67) that "some of the foreign ordinances say that, if a cable be cut or slipt to sail with convoy, the value shall be brought into a general contribution"; but this is not the practice with us. See *Casar. Disc.* 46, n. 9.

<sup>3</sup> *Nickerson v. Tyson*, 8 Mass. 467, 1 Mag. 181; Emerigon, ch. 12, § 41, vol. 1, p. 606 (ed. 1827); Ord. Copenhag. a. 1, § 10; Ord. Konigsb. a. 25. In Benecke & Stevens on Av. (Phillips's ed. p. 111), it is said, that though it is the practice in most countries to allow for the rigging so cut, in general average, at the value which it may be supposed to have had under those circumstances, yet in England no such allowance is made. For this two reasons are given. First, because it is said the rigging was then of no value at all. This reason is not adopted by Mr. Benecke, because he says it cannot be denied to be still of some value. He then goes on to say: "The true cause, as it appears to me, is, that under such circumstances, generally speaking, it would be impossible to work the vessel without cutting away the broken mast and the rigging in which it is entangled, so that this act was not optional, but dictated by necessity, and conse-

## SECTION VI.

## OF VOLUNTARY STRANDING.

There is one class of cases dependent on the question whether the sacrifice be voluntary, which has been frequently litigated, and in regard to which the authorities are much in conflict. It occurs when the ship is voluntarily stranded, or thrown upon the shore. Is this loss of the ship a general average loss, to be contributed for by the interests and property saved?

If the vessel be stranded by the mere force of the winds and waves, and against the will and efforts of the master, it is evident and certain that the loss is not a general average loss. But let us suppose a case where it is certain or nearly certain that the vessel will be thrown upon the shore, but it is in the captain's power to choose where she shall be stranded. This may be of very great importance. Under the lee of the vessel are only rocks which, make the entire destruction of property and life almost inevitable. At some distance, but within reach of the ship, is a smooth beach, and the master succeeds in casting the vessel away upon that beach, and by so doing life is saved and cargo is saved. The ship cannot be got off at all, or only at considerable cost; is the loss or is the cost of recovering the ship a general average loss?

The fact that the ship cannot be got off and is totally lost, it is now well settled, does not make the loss any less one of general average. Emerigon is clear that there is a right to contribution only when the ship is got off.<sup>1</sup> So it was held in Virginia in 1790,<sup>2</sup>

quently there was no sacrifice. But if such a circumstance occurred in sight of a port, which the vessel might reach without the rigging being cut, and this measure be resorted to merely to facilitate the manœuvring of the vessel, and to give her and the cargo a better chance of escaping the danger, in that case it would indeed be a sacrifice, and the rigging so cut away ought to be allowed for, at the value which it would have had if not cut away." See, further, *Lee v. Grinnell*, 5 Duer, 400; *Teetzman v. Clamageran*, 2 La. 197, and notes, *supra*.

<sup>1</sup> Emerigon, ch. 12, § 41, vol. 1, p. 600, ed. 1827 (Meredith's ed. 475), states the law as follows: "Damages occasioned by stranding are particular averages for account of the owners. But it would be general average if the stranding had been voluntarily effected for the common safety, as we have seen above, provided always that the vessel has been set afloat again; for if the stranding has been followed by a shipwreck, it is *saue qui peut*."

<sup>2</sup> *Eppes v. Tucker*, 4 Call, 346.

and in 1812 in New York.<sup>1</sup> But in 1814 a case came before Mr. Justice Washington, where a vessel was run ashore to escape capture and was totally lost. Now if she could have escaped otherwise, the loss would not have been one of general average, and, as the only choice of the vessel lay between capture and wreck, the loss would seem to come under the same principle as that of stranding where a safer place was chosen. And he held that there was a claim for contribution.<sup>2</sup>

In 1839 the question came before the Supreme Court of the United States, and that court unanimously decided that whether the ship were lost or recovered made no difference in regard to the liability of the owners of the cargo to contribute.<sup>3</sup> The opinion was given by Mr. Justice Story, and the whole subject was very elaborately considered. The reasons upon which it rests seem to us sound, and we incline to regard this as the rule of law for this country, although it has been held otherwise in New York.<sup>4</sup>

<sup>1</sup> *Bradhurst v. Col. Ins. Co.* 9 Johns. 9.

<sup>2</sup> *Caze v. Reilly*, 3 Wash. C. C. 298, s. c. *nom. Caze v. Richards*, 2 S. & R. 237, n.

<sup>3</sup> *Columbian Ins. Co. v. Ashby*, 13 Pet. 331.

<sup>4</sup> *Marshall v. Garner*, 6 Barb. 394. In this case it was held that the owners of a ship involuntarily stranded cannot claim a contribution from the owners of the cargo for the destruction of the masts and rigging by the master, in order to save the ship and cargo, and the lives of the crew, as general average, where, although the cargo is saved, the ship is finally lost totally. The case of *Rea v. Cutler*, 1 Sprague, 135, which was an action for contribution brought (in 1846) by the owners of the vessel against the owners of the cargo, was decided in favor of the libellant in the District and Circuit Courts for the District of Massachusetts. The facts of the case were substantially as follows: The bark *Zamora* was at anchor in Massachusetts Bay near Plymouth, in a violent gale of wind, with a high rocky coast under her lee. The anchors would not hold, and the vessel was being forced, stern foremost, towards a projecting rocky point, where the vessel and all on board must have perished. The captain made sail, slipped the cables, and endeavored to run along shore till he could find a safe place on which he might beach the vessel. While on the way the vessel struck on a sunken rock, passed over it, and went ashore among other rocks. The lives of the crew were saved, and also the cargo, though in part damaged. The vessel was totally lost. This case was taken, by appeal, to the Supreme Court of the United States, and was there dismissed for want of jurisdiction. *Cutler v. Rae*, 7 How. 729. A suit was then commenced in the Supreme Court of Massachusetts, which was decided in favor of the defendants. Nov. 1851. No opinion was given in court, and the case is not reported, but we understand that it was decided on the ground that, as matter of fact, the stranding was not voluntary.

But how is it if the vessel be got off? Without stating in the text the various views given in the cases on stranding, all of which we cite in our notes, we state, as the principle which we think must govern all these cases, that there must be a voluntary sacrifice of some positive value. If then the ship must inevitably be cast upon the shore, and all that the master does is to select a place, a time, and a mode of stranding her, we should say that this is not that voluntary sacrifice which the law of general average requires, and therefore is not an average loss.<sup>1</sup> All that the

In the case as reported in 1 Sprague, 135, the following statement of facts is made. "It appeared by the evidence that on the night of December 16th, 1845, during a violent gale, the vessel came to anchor about four miles off Manomet Point; that soon after, she began to drag, and drifted slowly, stern foremost, towards this point, which ran out about three quarters of a mile, and on which the breakers were very heavy. As it was impossible to keep clear of the shore by making sail, the captain concluded that one of two things must be done; either to cut away the masts, with the hope the anchors would then hold, or to slip the cables, make sail, and run the ship on shore in some place where there was a chance of saving life and property; he determined on the latter course, slipped his cables and made sail. After this was done, the vessel cleared the point, ran on a sunken rock, and afterwards on shore."

*Bigelow*, C. J., in *Merithew v. Sampson*, 4 Allen, 192, refers to *Rea v. Cutler*, and says that it is impossible now to say on what precise ground it was decided, and that, from the fact that it was not reported, the inference is that it turned on a question of fact, and did not involve any new principle of law. He adds: "The position that no claim for contribution can be sustained by the owner of the vessel where she is totally lost is not supported by the more recent authorities, and is not reconcilable with sound principles." See also *Gray v. Waln*, 2 S. & R. 229; *Mut. Safety Ins. Co. v. Cargo of Brig George*, Olcott, Adm. 89; *Barnard v. Adams*, 10 How. 270; *Patten v. Darling*, 1 Clifford, C. C. 254; *Code de Commerce*, art. 425; 2 *Browne*, Civ. & Adm. 199; *Weskett*, p. 132, § 4, p. 255, § 4.

The point as to the liability to contribution of the cargo which is saved, when the ship is lost by the stranding, does not appear to have ever directly arisen in the courts of England. *Abbott on Shipping*, 490; *Arn. on Ins.* 903.

<sup>1</sup> *Benecke*, Pr. of Indem., says, p. 219 (ed. 1824): "If the situation of the vessel were such as to admit of no alternative, so that without running her ashore she would have been unavoidably lost, and that measure were resorted to for the purpose of saving the lives or liberty of the crew, no contribution can take place, because nothing in fact was sacrificed. But if the vessel and cargo were in a perilous but not a desperate situation, and the measure of running her ashore deliberately adopted as best calculated to save the ship and cargo, in that case the damage sustained, according to the fundamental rules, constitute a claim for restitution."

master did was to strand in such a way as to give him a better hope of saving the ship, her cargo, and the lives of those on board.<sup>1</sup>

Moreover, if the ship is to be contributed for, it should only be on the value which she possessed at the time, and in the condition in which she was when the captain, abandoning all other hope, endeavored to choose his place; and this value would seem to be, in the case supposed, nothing.

But if the master had a substantial and valuable chance of saving his ship, and threw this chance away voluntarily, that he might make sure of saving the cargo, then the cargo should contribute to repay the loss, although the chance thus thrown away was less, and even much less, than a probability.

There are American cases undoubtedly which indicate a very different view of the subject; but we find it difficult to reconcile them with what seem to us the unquestionable principles of the law of general average. In the earliest case<sup>2</sup> on this subject,

<sup>1</sup> In a recent case in Connecticut, *Ellsworth, J.*, speaks as follows: "Now to me it seems little less than a paradox, that if a captain whose vessel is doomed to destruction by stranding should consider and select, for his compulsory going ashore, the place least perilous to himself and vessel, and least destructive to what might happen to escape the general destruction, such preference is the incurring a voluntary sacrifice which entitles him to call for contribution. 'Save himself who can,' is a maxim much more applicable to such a case. When a captain finds that his vessel must go on shore, and he exerts himself to go on in a safer place rather than a more dangerous one, he no more makes a voluntary sacrifice than when, in navigating his vessel, he chooses a safe channel rather than a hazardous one, or changes his course to avoid a rock or shoal. He does his plain duty to the general interest, to mitigate an unavoidable calamity, but not at all in any sense to make a loss by selecting a part to be sacrificed in order to insure safety to the rest. *Slater v. Hayward Rubber Co.* 26 Conn. 139.

<sup>2</sup> *Sims v. Gurney*, 4 Binn. 513. In giving the opinion of the court in this case, *Tilghman, C. J.*, says: "It is not necessary that the ship should be exposed to greater danger than she otherwise would have been, to make a case of general average. It is sufficient if a *certain loss* is incurred for the common benefit." But in a later case in the same State, an entirely opposite doctrine was maintained by *Gibson, C. J.*, who says: "It is not enough that there be a deliberate intent to do an act that may or may not lead to a loss; there must be a deliberate purpose to sacrifice the thing at all events, or, *at the very least, to put it in a situation in which the danger of eventual destruction would be increased*; and it is this deliberate purpose, combined with a view to the general welfare, which is the distinguishing feature between general and particular average. *Walker v. U. S. Ins. Co.* 11 S. & R. 61.

the master directed the course of the ship to a place other than that on which she would have been wrecked but for his action.

Mr. Phillips, in his treatise on Insurance, vol. 2, p. 93, note, in comparing these two cases, remarks: "But C. J. *Tilghman* was plainly right in this proposition, for the most usual case of average for jettison is a sacrifice where the thing sacrificed is in imminent danger of total destruction, with both ship and cargo; and the more certain the destruction would be without the sacrifice, the stronger is the claim for contribution." It is, however, precisely here that we distinguish between the two classes of voluntary stranding. If ship, cargo, and freight are all in *imminent* danger, but the danger is only *imminent*, and a part of the property exposed to the common danger, and having the common chance of safety, is purposely destroyed to save the rest, this is clearly a case of general average. But where the ship must be wrecked at all events, and there is no chance whatever of her safety, how can she found a claim for contribution on the mere fact that one place of destruction was preferred to another? If it be said that to avoid rocks, where she must have been torn to pieces, she seeks a beach where the cargo may be saved, one answer is, that she casts away no chance of safety by seeking this place; and another is, that she gives to herself, by going there, a possibility of ultimate safety, just as she does to the cargo. We should say that the decisions have generally turned upon the question whether there was only an *imminent* danger, or whether the wrecking of the ship was certain and inevitable. And as it must seldom be the case while a vessel floats that her safety is *impossible*, — for who can say when or how the wind may change, or what it will do for the vessel? — the cases in which this voluntary stranding gives a claim for contribution are now much the more numerous. We think the rule well illustrated in the dissenting opinion of Mr. Justice *Daniel*, in *Barnard v. Adams*, cited in a note on the next page.

In *Col. Ins. Co. v. Ashby*, 13 Pet. 331, the jury found that the stranding was voluntary, and the point in question was not discussed by the court. Yet this case is often cited as one in which the court held, on the facts, that there was a voluntary stranding. In *Meech v. Robinson*, 4 Whart. 360, the vessel must have gone ashore at any rate, and would inevitably have been lost, together with the crew and cargo. She was run ashore in a less dangerous place, and was totally lost, but the lives of the crew, together with a portion of the cargo, were saved. It was held that this was not a case for a general average contribution. *Walker v. U. S. Ins. Co.* *supra*, has been supposed to confirm this case, but the distinction between them is important. In this latter case the court held, as a matter of fact, that when the captain slipped his cables, it did not appear that it was his intention to run his vessel ashore, but rather to get her out to sea, and, failing in this, he was driven on shore against his will. *Meech v. Robinson* may seem, however, to be overruled by *Barnard v. Adams*, 10 How. 270. But in this last case it did not appear that the ship would have been inevitably lost. She was drifting in a gale towards a rocky and dangerous part of the coast, on which, if she had struck, she must inevitably have perished, together with the crew and cargo. To avoid this peril she was steered along the coast and finally run on a beach,

She must have been wrecked at all events, and it did not appear that the place to which the master carried her was in any degree better adapted to save either the ship or the cargo than that to which she would have gone of herself. This was held to be a general average loss. But we have never been able to see the reasonableness or propriety of this decision, although Mr. Justice Grier, in giving an opinion of the Supreme Court, speaks of it as having received the "unqualified assent" and the "unanimous approval" of that court.<sup>1</sup>

and all the cargo saved. This was held to be a case of general average contribution. The vessel was not destroyed, but she was so high on the beach that it would have cost more to get her off than she would have been worth when off. A somewhat similar case came before the Circuit Court for the First Circuit in 1854. *Sturgess v. Cary*, 2 Curtis, C. C. 59. The vessel was at anchor, but in extreme danger of dragging her anchor and going to pieces, by being driven on a rocky shore by the violence of the wind and sea. To save the cargo and the lives of the crew, she was run on a beach. Contrary to expectation, the vessel was not lost, but was subsequently got off and repaired. For the expenses thereby incurred, the owners of the cargo were held liable to contribute.

In *Reynolds v. Ocean Ins. Co.* 22 Pick. 191, it was decided that if a vessel at anchor is in imminent peril, and there is every probability that she will soon sink at her anchors or part her cables and drive on shore, unless her cables are cut; and they consequently are cut, and the vessel is voluntarily run on shore as the best expedient for saving life and property, the expense of getting her off is a subject of general average, and this without regard to the consideration whether the voyage is resumed, or the cargo again taken on board or not.

<sup>1</sup> *Barnard v. Adams*, 10 How. 270, *supra*. In giving the opinion of the court in this case, Mr. J. Grier says, in approval of the instructions of the court below: "The court should, therefore, not be understood as saying, that if the jury believed the peril which was avoided was 'inevitable,' or that, if the jury believed that the imminent peril was *not* avoided, they should find for the plaintiffs. But rather, that if they believed there was an imminent peril of being driven 'on a rocky and dangerous part of the coast, where the vessel would have been inevitably wrecked, with loss of ship, cargo, and crew, and that this immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured, then they should find for the plaintiffs." He says again, p. 305, speaking of the proper use of the term "sacrifice" in general average: "The offering of sacrifices was founded on the idea of vicarious suffering. And when it is said of the *jactus* that it is sacrificed for the benefit of the whole, it means no more than that it is selected to undergo the peril in place of the whole, and for the benefit of the whole. It is made (if we may use another theological phrase) the 'scapegoat' for the remainder of the joint property exposed to common destruction. The *jactus* is said to be sacrificed, not because its chance of escape was separate, but because

## SECTION VII.

## OF A SALE BY THE MASTER.

There is another case which seems to come to some extent at least within the principles of general average. It occurs when the master in a port of distress sells a part of the cargo to raise funds to enable him to pursue his voyage, and take the ship and residue of the cargo to the port of destination. We consider his powers in this respect, as to ship and cargo, fully elsewhere.

The question to be considered is, whether this is to be contributed for. The loss would seem to resemble very much a loss by jettison.<sup>1</sup> It satisfies the three great requirements of the law of general average, for it is voluntary, necessary, and effectual. And we should have no doubt that the loss would be a general average loss so far that the property and interests saved thereby should contribute for it.<sup>2</sup>

of its selection to suffer, be it more or less, instead of the whole, whose chances of safety, as a whole, had become desperate. The imminent destruction of the whole has been evaded as a whole, and part saved by transferring the whole peril to another part." In a dissenting opinion, Mr. Justice *Daniel* speaks as follows: "I am wholly unable to perceive how, in conformity with the rules and principles above cited as constituting the foundation of general average, contribution could justly be claimed, in this instance, for the loss of the ship. For there is not a scintilla of proof in this cause tending to show a design to sacrifice the ship or anything else, nor tending to prove that the course pursued was one which, under any circumstances, could possibly have been avoided. On the contrary, the testimony establishes, as far as it is possible to establish any facts, that the stranding was the effect of the *vis major* of an inevitable necessity, that every effort was made to avoid this necessity, and that the only act of the mind apparent in the case was the determination, to repeat the language of Mr. Phillips already quoted, 'merely to steer her to a less dangerous place for stranding, when she was inevitably drifting to the shore,' — a determination not less for the benefit of the ship than for that of the cargo, and one falling within the general scope of the duty and discretion of every master or seaman."

<sup>1</sup> See remark of Mr. Justice *Story* in the case of *The Ship Packet*, 3 Mason, 260, *infra*, and 3 Kent, Com. 242.

<sup>2</sup> In *The Gratitude*, 3 Rob. Adm. 240, 263 (which was a case of a master hypothecating his cargo to pay for necessary repairs), Lord *Stowell* said the books overflowed with authorities that the master might sell *part* of his cargo, and that a sale of part was equivalent to the hypothecation of the whole, and was a fit subject for general average. And Lord *Ellenborough*, in *Dobson v. Wilson*, 3 Camp. 480, 487, expressed his opinion that if a ship should be seized for the non-



It is possible that the money should be raised or used for the benefit of the ship only; and in that case the ship-owner should repay to the shipper whatever he lost by the sale of his goods, and the

payment of the Sound dues, and it became necessary to sell a part of the cargo, in order to obtain her release, this might be the foundation of a claim for general average. Where the master of a Peruvian vessel, bound from Lima to London, had sold some silver, part of the homeward cargo, at Bahia, to raise funds for repairing the ship, it was held to be a subject of general average, but that a court of admiralty, administering the ordinary maritime law of nations, has not jurisdiction to entertain questions of general average, or power to adjudicate thereon. *The Constancia*, 4 Notes of Cases, 677.

Mr. Justice Story, in the case of *The Ship Packet*, 3 Mason, 255, 260, said "In the case of a sale of part of the cargo by the master for the necessities of the ship, the sale is in the nature of a compulsive loan for the benefit of all concerned, and to enable the ship to prosecute her voyage. It bears a considerable resemblance to the case of a jettison, for the owner is deprived of his property for the common good, and to him it must be immaterial whether the loss be by a sacrifice at sea or on shore." In *Giles v. Eagle Ins. Co.* 2 Met. 140, 144, the loss in the sale of a quantity of salt, which had been sold to pay the expenses incurred in getting off and repairing a vessel which had been driven on shore in a gale, was compensated for in general average. In *The Schooner Leonidas*, Olcott, Adm. 12, 15, there is a *dictum* that where the master sells part of the cargo to supply the necessities of the ship, the owners would probably be entitled, in case the ship or owners could not satisfy their demand, to compel the other owners of the cargo to contribute according to their respective interests. In *The Mary*, 1 Sprague, 51, specie was shipped from Boston to Porto Cabello to purchase a return cargo. The vessel was obliged to put into Antigua, and while there the master, being destitute of funds, sold part of the specie for the purpose of making repairs, and the vessel proceeded to her port of destination, and thence to Boston. It was admitted that the specie should be paid for in general average, and it was held that the owners were entitled to interest on the same from the time when they would have had the benefit of it at Porto Cabello if it had been carried forward. See also *The Hoffnung*, 6 Rob. Adm. 383; Emerigon on Maritime Loans, c. 4, § 9, c. 12, § 4; Consolato del Mare, c. 104, 105, 106; Stevens on Average, 19, 24, 28, 29; Weskett on Ins. 252, 256, 259, art. 16. Where goods are sold by the captain in order to obtain funds for repairing particular average losses, or for defraying the ordinary expenses of navigation, the loss arising from their sale must be made good by the ship-owner alone; but where they are sold for the purpose of defraying expenses or repairing losses which are themselves of the nature of general average, the loss arising from their sale gives a claim to general average contribution. *Hassam v. St. Louis Ins. Co.* 7 La. Ann. 11. Where a part of the cargo is sold by the master at an intermediate port, to make permanent repairs of damage, caused by a peril passed, and not for the benefit of all parties, the loss is excluded from general average. *Dyer v. Piscataqua Ins. Co.* 53 Maine, 118.

residue of the cargo should not contribute.<sup>1</sup> And if raised and used for the benefit of the cargo only, then the ship should not contribute; and it is obvious that no such sale would come within the principles of average, if the cargo were sold because it was perishable; or for any other case or reason whatever, except to deliver from an extraordinary peril the property called upon to contribute.

In the case in which this power of the master has been most fully considered, Lord Stowell says: "The power of selling cannot extend to the whole, because it can never be for the benefit of the cargo that the whole should be sold."<sup>2</sup> We should have some doubts, however, whether this is always and strictly true, if, as is certain, the jettison of the whole cargo may be justified, and give a claim for contribution on the ship; or that the whole ship and freight may be sacrificed to save the cargo; in which case the cargo should contribute. It is at least possible to imagine circumstances which would render it justifiable in the master to sell all that the ship contains, that he might thereby save the ship; and in that case there can be no doubt that the ship should make compensation for the loss.<sup>3</sup>

Supposing a sale of the cargo in a port of distress, there would be no loss and therefore nothing to be contributed for, if it brought as much as it would have brought had it reached safely its port of destination. For there is then no diminution of value, and nothing to be contributed for. If the loss be considered as standing on the same ground with that of jettison, it might be difficult to avoid the conclusion to which Mr. Stevens comes.<sup>4</sup> We apprehend,

<sup>1</sup> In a case where the ship, being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair, and, in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses, it was held that the owners of the goods were entitled to be reimbursed by the owner of the ship. *Powell v. Gudgeon*, 5 M. & S. 431. In this case, *Bayley, J.*, said: "The owner of the ship undertakes to have the ship fit to perform her voyage; and in case of accident it is the duty of the owner, and the master in place of the owner, to provide for its repair." The same principle was maintained in *Sarquy v. Hobson*, 4 Bing. 131.

<sup>2</sup> *The Gratitude*, 3 Rob. Adm. 240.

<sup>3</sup> *United Ins. Co. v. Scott*, 1 Johns. 105, seems to illustrate and support this principle.

<sup>4</sup> *Stevens & Benecke on Av.* (Phil. ed.) 71. Mr. Stevens here says: "But the

however, that it is not to be considered, as far as this question goes, as quite the same thing as a loss by jettison. If the property of the shipper is taken and sold, and the sale is justified by necessity, the master acts as a *quasi* agent of the shipper, his agency springing from the necessity. And we should say that the shipper is entitled to the whole of the price which his goods bring, subject, in certain cases, to the requirement of contribution. If they bring less than they would have brought if they had arrived at the port of destination, we think he has a right to claim compensation from those for whose benefit he suffered this loss. Nevertheless, if they bring more, we do not think that the owners of the other interests have a right to any part of his profit. If all his goods are sold, the shipper saves nothing for which he could be called upon to contribute. But if a part only be sold, and the rest are carried forward by means of the money so raised, he is now benefited by the sale, and should contribute accordingly.

question has arisen, — where there is a *profit* on the sale of the goods instead of a loss, — who is to have the benefit of it? This question is readily answered if we treat the case on the broad ground of considering it as a jettison, and by which we shall put the proprietor in the same situation as the proprietors of the other part of the cargo, viz. by paying him the estimated proceeds at the port of discharge, as if his goods had arrived. Thus, it is submitted, that the parties who would have borne the loss ought to receive the profit; and which will be done by deducting the proportion of the amount from the *average charges*, in precisely the same manner as the proportion of the loss is always added to them. For, it may be asked, on whose account, or rather on what account, does the master dispose of the goods? The answer is, certainly not on account of the proprietor of them. He is guaranteed against all possible loss, and therefore he can have no concern with the event of the sale. The master, in fact, having no other means of raising money, takes these goods indiscriminately from the rest of the cargo, and disposes of them for the general benefit of all concerned, for the purpose of setting the ship forward on her voyage; and, by treating this as a jettison, justice is done to all parties. We are aware that the opinion of one of the learned judges of the Court of King's Bench is contrary to this; but it is submitted with great deference that it is on mistaken grounds: that learned person supposing that the owner of the ship would put the profit in his pocket, and thus that the case might occur where the master of the ship (his servant) might dispose of the cargo for his benefit."

## SECTION VIII.

## WHAT EXPENSES COME INTO GENERAL AVERAGE.

Hitherto we have considered only cases in which property was actually destroyed or sold and was contributed for. It is, however, a well-settled rule of the law of general average, that extraordinary expenditures for the common benefit are to be contributed for. But the cases turning upon the question, what are such expenses, are very numerous; and there is no part of the law of general average which has been more frequently litigated, and in regard to which the law and the practice are even now more uncertain.

It is, however, quite certain that there must be, here as elsewhere, a sacrifice which is voluntary, necessary, and effectual. But it would seem that not only those expenses are to be contributed for which are directly consequent upon or connected with the voluntary destruction of property, but that there may be cases in which expenses by themselves constitute a general average loss.<sup>1</sup>

<sup>1</sup> It was held in *Padelford v. Boardman*, 4 Mass. 548, that repairs generally do not go to the account of general average. See also *Ross v. Ship Active*, 2 Wash. C. C. 226; *Jackson v. Charnock*, 8 T. R. 509; *Emerigon*, ch. 12, § 41 (*Meredith's ed.*) p. 481. In *Brooks v. Oriental Ins. Co.* 7 Pick. 259, the vessel, having received damages in a storm, was partially repaired at the Balize. These repairs were considered by the court to be strictly necessary, and to be of no value to the vessel after her return home. Speaking of the general question, the court said: "As to the third question, it is contended for the defendants, that the temporary repairs should be charged to general average; and we are referred to *Plumer v. Wildman*, 3 M. & S. 482, which in several particulars resembled the case at bar. The ship had been run foul of, and so much damaged as to make it necessary to return to her port to repair, to enable her to perform the voyage; and she was afterwards completely repaired at the end of the voyage. The expenses of repairs which were made abroad, which were strictly necessary to enable the ship to perform her voyage, were placed to the account of general average. *Bayley, J.*, doubted whether the repair of any particular damage could be placed to the account of general average, inasmuch as it is a benefit done to the ship. The court considered those repairs only under the account of general average which were absolutely necessary for the enabling of the ship to pursue her voyage; and all beyond were set down to the account of the ship. Therefore, deducting the benefit, if there be any, which still results to the ship from the repair, the rest may be placed to the account of general average." In *Hassam v. St. Louis Ins. Co.* 7 La. Ann. 11, the vessel was injured by a storm, and put into a port for repairs. It was agreed that the voyage could not have been completed

As, for example, cases of capture and ransom or other expenses for release, and expenses for necessary repair, which would frequently belong to this class.

In a previous part of this chapter we have spoken of a question as frequently arising, and sometimes difficult, whether the loss was one of intentional sacrifice for the common benefit, or arose only from the ordinary perils of navigation. Closely analogous to this question is another, — also difficult and of frequent recurrence, — arising from the duties and obligations of the owner and master as to the seaworthiness and proper navigation of the ship. Nothing can be more certain than that it is the duty of both owner and master to keep the ship always in a condition of seaworthiness, as far as this is possible, and to provide and to do all that belongs to her proper navigation; and for all this the owner is paid by his freight. That the discharge of this duty is for the common benefit constitutes no reason whatever why the owner should be paid therefor, in the whole or in any particular, otherwise than by his freight. It becomes then important, and is often difficult, to discriminate between expenses, on the one hand, which were incurred for the common benefit, but nevertheless belonged to the navigation of the vessel, and are, therefore, within that duty of the ship-owner

without the repairs; that the cargo could only have been sold at a great sacrifice, and that no means of transshipping and sending it on presented themselves; yet the court held that the expenses thus necessarily incurred were not the subject of general average. In *Sparks v. Kittredge*, 9 Law Rep. 318, *Sprague, J.*, said: "Often the right of the master to detain a cargo while he makes repairs is a burden upon the shipper, and is of no benefit to him, except in extraordinary cases; as where no other vessels can be procured to take it, and the cargo would perish or be of no value if left. In such a case, if the expenses of repairs exceed the benefit to the ship-owner therefrom, it is manifest that such excess should be paid by the cargo, if incurred for its benefit; but whether such payment should be made by general average or payment of the whole excess, there seems to be some diversity of opinion."

Expenses incurred in raising a sunken vessel, not for the purpose of saving the vessel and crew and cargo from a common danger, but for the mere purpose of getting up the vessel, so that she might be repaired, are not general average. *Firemens' Ins. Co. v. Fitzhugh*, 4 B. Mon. 160.

The expense of employing extra seamen in pumping, and navigating the vessel from the place where she was injured to a port of necessity, is a general average charge. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456, 469. See *Da Costa v. Newnham*, 2 T. R. 407; *Barker v. Phoenix Ins. Co.* 8 Johns. 307; *The Copenhagen*, 1 Rob. Adm. 289, 294.

which arises from his obligation to carry the goods safely to their destination, and which are therefore not within the law of general average, and, on the other hand, expenses of a similar character, which were incurred because an extraordinary peril, which involved all the property in a common danger, made these expenses necessary for the benefit of all the property.

Thus a vessel must often take a pilot, or it may need to be towed into a port, or money must be paid for anchors, or cables, or provisions, and the vessel must be kept in good repair, and during the repair it may be necessary to hire people to guard property, or to remove obstructions by ice or otherwise. These charges and others of a similar kind are not to be contributed for when they occur in the ordinary course of navigation, but they are to be contributed for when they are made necessary by an extraordinary peril common to all the property.

A test very commonly applied to determine this question is, whether they occur in a port of distress. It is not enough, however, to bring these expenses within general average, that the ship was obliged to deviate from her course and go into this port; for the necessity may have arisen from the insufficiency of water or provisions, or of the sails or spars. This would be the fault of the ship, and the expenses must be borne by the ship only. Such charges as we have above enumerated constitute a general average loss only when the ship was driven into this port of distress by an extraordinary peril.

A recent case in England is quite instructive on this subject. A clipper sailing ship of 2,000 tons, with an auxiliary steam screw of 130-horse power, and carrying 550 tons of coal, sailed on a voyage from Australia to England. After eleven days she came in collision with an iceberg, and suffered so much damage in her masts and upper works on one side as practically to have lost all power of sailing. She reached Rio de Janeiro under steam alone, having nearly exhausted her stock of coal. The repairs necessary to restore her sailing powers would have cost at Rio many thousand pounds more than in England, and would have occupied several months, and the cargo would have had to be unshipped and warehoused. The captain, therefore, had only temporary repairs made (which took three days), sufficient to enable him to complete his voyage under steam alone; and in order to do this he had to pur-

chase coal at Rio and again at Fayal. The voyage having been accomplished under steam alone, the ship-owners sought to charge the cost of the coal against shippers of cargo as general average, either on the principle that the expenditure was a substitution, beneficial to all parties, for a greater expenditure, which the captain had a right to incur by repairing at Rio, and ought to be apportioned in the same way that the greater expenditure would have been, or as an extraordinary expenditure for the general advantage of all interests concerned. It was held, that, even assuming the repairing at Rio would have been justifiable, and any of the incidental expenses chargeable against the shippers as general average, there was no legal principle on which expenses incurred by one course could be apportioned according to what might have been the facts if a different course had been adopted. The court say further that the ship-owners, by their contract with the freighters, are bound to give the services of their crew and of their ships, and to make all disbursements necessary for this purpose. In the case of a vessel equipped with an auxiliary screw, their contract includes the use of that screw, and consequently the disbursements necessary for fuel for the steam-engine. The disaster which occurred caused the engine to be used to a much greater extent than would generally occur in such a voyage, and so caused the disbursements for coal to be extraordinarily heavy; but it did not render it an extraordinary disbursement. The case is said to be similar to that of an ordinary sailing vessel, in which, owing to disasters, the voyage is extraordinarily protracted, and consequently the owner's disbursements for provisions, and for the wages of the crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump, when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature. There was, therefore, no right to charge this item to general average.<sup>1</sup>

Among the expenses for which contribution is sought is that of paying and maintaining the crew while the ship is seeking the port where repairs may be made or supplies procured, and while the ship is necessarily in that port. The French authorities indicate that, in their country, the question whether the cost of wages

<sup>1</sup> *Wilson v. Bank of Victoria*, Law Rep. 2 Q. B. 203.

and provisions is a general average loss cannot be considered as settled.<sup>1</sup> But if these expenses are incurred when the necessity for going into port was created by a loss which was itself a general average loss, it seems to be conceded that the resulting expenses also come into average.

But it is a question whether this is the case when the original loss is not one of general average. For example, if a storm blows away the mast, it is certain that this loss is not one of general average, but it may make it necessary for the vessel to bear away and seek a port of repair; and this is done for the safety of ship and cargo. And it is then a question whether the wages and provisions are to be contributed for. In England the law seems to be not entirely settled,<sup>2</sup> but the latest authority, which, however, is only a *dictum*, would lead to the conclusion that in such a case the wages and provisions and other expenses of the detention do not constitute a general average loss, as the repairs themselves certainly would not.<sup>3</sup>

In this country, by the decided weight of authority, although not without some exceptions, these expenses would come under the law of general average from the time the vessel bore away for her port of repair, provided only that it was necessary, for the safety of ship and cargo alike, that the repairs should be made,

<sup>1</sup> Emerigon, ch. 12, s. 41, § 5 (Meredith's ed.), 480, and Pardessus, art. 741, vol. 3, p. 228, contend that expenses attending the delay, such as wages and provisions, are subjects of general average contribution. On the other hand, Lemonnier, who has critically examined the subject, is of the opinion that these expenses are not to be contributed for. Lemonnier, *Ass. Maritime*, vol. 2, p. 107, 118; Paris, 1843. In this he is supported by Boulay Paty. These authorities, however, admit that, if the going into port was caused by a general average loss, the expenses there incurred are to be contributed for.

<sup>2</sup> *Lateward v. Curling*, 1776, Park on Ins. (8th ed.) 288; *Fletcher v. Poole*, 1769, *ibid.* 115; *Eden v. Poole*, *ibid.* 117; *Robertson v. Ewer*, *ibid.* 117, 1 T. R. 127; *Da Costa v. Newnham*, 2 T. R. 407; *Plummer v. Wildman*, 3 M. & S. 482; *Power v. Whitmore*, 4 M. & S. 141; *De Vaux v. Salvador*, 4 A. & E. 420; *Sharp v. Gladstone*, 7 East, 24; *Beawes*, Lex Merc. 171. See *post*, p. 387, n. 1, where the question as to wages in case of capture is discussed. See also *DalGLISH v. Davidson*, 5 Dowl. & R. 6.

<sup>3</sup> *Hallett v. Wigram*, 9 C. B. 580. The *dictum* in this case is to the effect that, if the injury which led the vessel to seek a port of refuge was itself a subject for general average, then the wages and provisions of the crew, and other expenses during the detention, are to be contributed for in general average, but otherwise not.



whether the injury which created the necessity was or was not itself within the law of general average.<sup>1</sup>

This may be regarded, we think, as the settled doctrine and practice in this country. We shall give the authorities on this question more fully when treating of the adjustment of general average.

In one case in Massachusetts where a ship went ashore in a storm, and was got off and repaired, it was held that the wages and provisions during the time of repair did not constitute a general average loss.<sup>2</sup> This case would seem to be opposed to the prevailing rule in Massachusetts. The principal reason given seems to be, that, as the crew had not been discharged, their wages and provisions were furnished to them by the ship-owner under his general duty. A better reason might have been that the vessel was repaired in the port in which or near which she had been stranded, and there was therefore no voluntary putting away for a port of repair.<sup>3</sup> The case, however, certainly seems to differ from the

<sup>1</sup> *Walden v. Leroy*, 2 Caines, 263; *Thornton v. U. S. Ins. Co.* 3 Fairf. 150; *Henshaw v. Mar. Ins. Co.* 2 Caines, 274; *Padelford v. Boardman*, 4 Mass. 548; *Barker v. Phoenix Ins. Co.* 8 Johns. 307, 318; *Potter v. Ocean Ins. Co.* 3 Sumner, 27; *The Brig Mary*, 1 Sprague, 17; *Hanse v. New Orleans Ins. Co.* 10 La. 1; *Clark v. U. S. Ins. Co.* 7 Mass. 365; *Peters v. Warren Ins. Co.* 3 Sumner, 400; *Ross v. Ship Active*, 2 Wash. C. C. 226; *Bixby v. Franklin Ins. Co.* 8 Pick. 86, more fully reported in 3 Sumner, 46, note.

<sup>2</sup> *Giles v. Eagle Ins. Co.* 2 Met. 140.

<sup>3</sup> The case therefore comes within the exception pointed out by Mr. Justice *Sewall*, in *Padelford v. Boardman*, 4 Mass. 548, 552. See also *Spafford v. Dodge*, 14 Mass. 66, 74. The answer to this will probably be, that, since the court allowed the wages of the other persons hired to get the vessel off, this showed that the expense was considered as a general average one. This is owing to a confused understanding of the phrase "general average." Such an expense was not, strictly speaking, a general average expense, there being no voluntary sacrifice; but, the expense having been incurred in consequence of a direct peril of the sea, a liability was thereby imposed upon the interests benefited, somewhat similar in its nature to a general average. Although this distinction may appear somewhat hypercritical, yet it seems to us to be the only one by which the authorities can be reconciled; and, moreover, it is fully justified by the language of the court in *Greely v. Tremont Ins. Co.* 9 Cush. 415, 421. In *Gazzam v. Cincinnati Ins. Co.* 6 Ohio, 71, it was held that where a vessel, insured on a time policy, was stranded on a rock, the wages of the crew during the detention were not the subject of a general average contribution, the crew being retained under their original agreement. But where a vessel was purposely run ashore, in order to save the cargo, it was held that the wages of the crew while employed in labor-

current of Massachusetts authority, and if it is to be considered that the expense of repair and service is excluded from general average because the service is rendered and the repairs are made in whole or in part by the crew of the vessel, we cannot think that this conclusion accords with the prevailing rule of this country.

The difficulty no doubt is that of distinguishing between cases in which the master does only his duty in repairing the vessel, and the crew do only their duty in helping him, and those in which the crew are called upon by extraordinary circumstances to do extraordinary work.

If a vessel be captured, the expenses incurred in efforts to recover the property, together with those necessarily caused by the delay, constitute a general average loss.<sup>1</sup> If the crew are

ing for the joint benefit of the adventure were a proper charge in general average. *Barnard v. Adams*, 10 How. 270.

<sup>1</sup> Upon the point whether expenses incurred during a detention by capture are the subject of general average contribution, the authorities are in conflict. *Magens* says, p. 67, that wages have been allowed to be general average, as well in London as elsewhere, when the continued employment of the seamen is with the sole view of being enabled to prosecute the voyage immediately on the ship being cleared. *Marshall*, p. 464, and *Park*, 287, citing *Beawes*, 150, concur in this view. *Benecke*, on the contrary, holds that these expenses are by the nature of the subject particular average, as none of the particulars requisite to constitute a general average exist, the detention not being the free determination of the master and crew, and it not being considered as a measure adopted for the benefit of the whole that the crew are retained in service, since the captain owes the services of the seamen to the shippers during the whole of the voyage, however protracted by accidental causes. *Benecke on Insurance*, 234.

In *Kingston v. Girard*, 4 Dall. 274, the court say: "Whether the extraordinary expense incurred for seamen's wages, provisions, &c., during the detention of the vessel, upon a capture as prize, is a subject of general average, forms an important question. . . . It is, upon the whole, a safe and the best rule to consider whether the expense is incurred for the general benefit of all the parties interested in ship, cargo, and freight. If it is, then all the parties should contribute to defray it. If it is not (as in the cases of embargo and quarantine, where the delay and expense are submitted to merely that the vessel may earn her freight), then the party who alone enjoys the benefit should alone sustain the loss."

Where a vessel, chartered for the voyage at a certain hire by the month, was captured as prize, but afterwards restored, it was held that the costs and charges paid by the hirer in procuring the restoration of the vessel and cargo should be allowed as a general average on vessel, cargo, and freight, according to the value of each at the place of detention, but that the wages and provisions of the crew

detained during a delay caused by such a necessity, that the master may have his crew ready for prosecuting the voyage if his ship

during the detention should be excluded. *Spafford v. Dodge*, 14 Mass. 66. As to wages and provisions during capture, Mr. Justice *Jackson*, in *Spafford v. Dodge*, states the law as follows: "As to the wages and provisions of the crew during the detention, we are unable, notwithstanding the very respectable authorities cited in support of this claim, to see any ground on which we can allow it, consistently with the established principles on this subject and the course of decisions in this State. The only case in which this charge has been allowed in an account of a general average in our courts was where it was necessary to go into port to repair damages sustained during the voyage from the perils of the sea; and the master, for that reason, voluntarily sought a port to refit. Here, it is to be observed, the delay was voluntarily incurred by the master; *the mind and agency of man were employed in producing it*; and this circumstance is deemed essential in every case of general average, in contradistinction to such unavoidable detentions and losses as arise from accident beyond the control of the master. We see no ground of distinction, in this respect, between a temporary detention occasioned by a hostile seizure, and one which is occasioned by an embargo, or by a tempest, or other common peril of the sea. . . . The ship-owner might as well claim a contribution for the wear and tear of his ship during the detention, or the owner of the cargo for the interest of his money, for the deterioration of his merchandise, or for the loss of a market, by the delay, as the owner of the freight for the extraordinary wages and provisions expended on such an occasion."

The point has, however, been generally decided otherwise. See *Leavenworth v. Delafield*, 1 Caines, 573; *Hurtin v. Phoenix Ins. Co.* 1 Wash. C. C. 400. In *Penny v. N. Y. Ins. Co.* 3 Caines, 155, *Livingston, J.*, who gave the opinion in *Leavenworth v. Delafield*, draws a distinction between an embargo and a capture. He says that a capture dissolves the contract, while an embargo does not, and that, therefore, in the latter case the seamen are under obligations to remain by the vessel, while in the former they are at liberty to depart, and if they remain, this is a voluntary act on their part, and their wages and provisions, therefore, are a subject of general average contribution. *Ricard*, in his work on the commerce of Amsterdam, cited in *Penny v. N. Y. Ins. Co.*, assigns nearly the same reason for this distinction, as follows: "The wages of a ship, detained by an order of state, shall not be brought into general average as in case of capture; because in the latter case the crew remain to take care of the vessel whilst she is *reclaiming*, and these charges are occasioned with the *sole* view of preserving the ship and cargo for the proprietors; but there is no room for such pretence in the case of an embargo; as the sovereign who lays it neither claims the ship nor cargo, but only for political reasons prevents their immediate departure. Therefore, it cannot be said that the ship's company remained on board to prevent an entire loss." This distinction is shown to be incorrect in *Spafford v. Dodge*, and it is there held, that the contract is no more dissolved in the one case than in the other, and in support of this proposition the court cites *Brooks v. Dorr*, 2 Mass. 39; the opinion of Lord *Kenyon* in *Pratt v. Cuff*, cited in 4 East, 43; of Lord *Eldon*

be released, this would raise a somewhat different question. Still, we should be inclined to say that their wages and provisions should

in *Bergstrom v. Mills*, 3 Esp. 36, and other authorities. In the case of *The Nathaniel Hooper*, 3 Sumner, 542, 557, since adjudicated, Mr. Justice *Story* expresses an opinion in accordance with that in *Spafford v. Dodge*. The law laid down in Massachusetts seems, therefore, to be more consistent and better founded on principle than the New York doctrine. It has, however, been suggested by an eminent writer on this subject (see *Walden v. Le Roy*, 2 Am. Leading Cases, 1st ed. 404, 424, where the question is fully and learnedly discussed), that the inquiry is not whether a capture, under ordinary circumstances, terminates a contract of affreightment, but it is said, that "general average has its origin in the intervention of a *vis major*, introducing a new set of relations into the contract for the time being, apart from the effect which it may have in abrogating it altogether; and that, whenever this is the case, a sacrifice, voluntarily made for the benefit of all, will render all liable for contribution, whether the party making it were or were not bound to pursue that course, in pursuance of the general duties of his position, or under the express or implied provisions of any previous contract." In support of this view, the illustration is given of a master being bound to cut away the masts or slip the cables of his vessel, if such a course were necessary to prevent the ship and cargo from being stranded or otherwise injured by any great disaster, "and yet," it is said, that "it has never been supposed that because his action in this respect was done in discharge of the obligation imposed by his position, the owners of the cargo were entitled to deny the character of general average to the loss thus occasioned, or to say that if what had been done were necessary for the safety of the cargo, it was done in pursuance of the prior obligations of the master and owner; and if it were not, that no contribution could be claimed for a sacrifice which had not been beneficial."

Where a ship was captured for a supposed breach of blockade, libelled, and condemned, and the owner appealed from the sentence, and the same was reversed, it was held that the expenses incurred by him on the two trials in the courts of admiralty constituted a general average. *Dorr v. Union Ins. Co.* 8 Mass. 494.

The wages of the master and crew during a forcible detention with a hostile purpose, though not a capture, give a claim to general average. *Sharp v. Gladstone*, 7 East, 24.

In this case Lord *Ellenborough* remarked, that "it was for the interest of all that the ship's crew should be kept in a state to navigate her home with the cargo; and, if for the benefit of all, was it not fair that the expense should be divided proportionably?"

In France the extra wages of a crew, when a vessel puts into port and remains there to avoid an enemy, are a gross average. 1 Emerigon, 556. In cases of capture, the additional freight becomes gross average, and falls upon the ship and merchandise. *Cleirac*, *Jugemens d'Oleron*, art. 4, n. 4. The expenses incurred in endeavors to protect and reclaim captured property prior to the time

be contributed for in the same way and on the same ground as where a vessel is compelled by some extraordinary peril to seek a port of repair.

Some question has been made, whether, when the master did in fact retain the crew for the purpose above stated, but might have discharged them and obtained a new crew when ready to sail, the wages and provisions were then to be contributed for. We think, however, that the question of discharge or detention is one within the master's power and discretion, and if he exercised this discretion honestly, as the best thing he could do for all concerned, the circumstance that he might have discharged the crew would not have prevented these expenses from coming under general average; although an unquestionable waste of money, by this detention, might have the effect of throwing this expense on the ship alone.

In a case where three months' extra wages were paid under direction of the American Consul at the Isle of France by reason of his mistake of the law, it was held that this expense was not a charge of general average.<sup>1</sup> And if they are retained by the master only because he erroneously thought that his contract with them bound him to do so, and not as a measure proper for the safety of the ship and cargo, then their wages and provisions do not come within general average.

If the vessel be stranded not voluntarily, and expenses are incurred for getting her off, and the effort is unsuccessful, the ship alone pays for that. If the vessel be got off, then are these ex-

of the composition made by the captain are to be apportioned upon the principles of a general average. *Jumel v. Mar. Ins. Co.* 7 Johns. 424.

In *Leavenworth v. Delafield*, 1 Caines, 573, where the question was whether wages and provisions, during a detention after capture, formed a general average, Mr. Justice *Livingston* said: "When it is considered that capture is a disaster which generally happens without fault of the owner of goods or vessel, but by superior force, against which no human precaution can always provide, and that the expenses here in dispute are incurred in consequence of this *vis major*, or *casus fortuitus*, and for the common benefit of all, it is not easy to assign a reason why they should be borne by one of the parties in misfortune rather than another."

The payment of salvage upon a recapture, being for the benefit of all persons concerned in ship, cargo, and freight, falls within the rule of general average. *Sansom v. Ball*, 4 Dall. 459.

<sup>1</sup> *Dodge v. Union Ins. Co.* 17 Mass. 471.

penses to be contributed for? As it was the duty of the master to keep the vessel off the shore if he could, is it not as plainly his duty to get her off if he can? So, if he accidentally loses an anchor, or a sail is blown away, or a spar, or many sails and many spars, the extent of his duty, but not its character, is changed. And if the vessel is on shore, and he can get her off and carry the goods to their destination, is it not simply his duty to do so, and is not the cost of doing it his loss? So it may be argued, and our notes will show that there is some conflict in the authorities. Perhaps it may be said that the tendency of the American courts and of the American practice is to consider these expenses as a general average loss; while that of the English courts is to charge them to the ship alone. Here, as in some other questions, the English courts seem to construe the duty and obligation of the owner and master more strongly against them than do the courts of this country.<sup>1</sup>

<sup>1</sup> In *Bedford Ins. Co. v. Parker*, 2 Pick. 1, a ship insured was accidentally stranded within a few miles of her port of destination. A, the owner of the cargo, which consisted of iron, saved part of it at his own expense. The insurers afterwards sent men on board, who endeavored without success to get the ship off, and at the same time the men employed by A saved forty tons more of the iron. The two parties of men acted separately, though sometimes assisting each other. After this the insurers contracted to pay B twenty-six hundred dollars, if he would get the ship off, and A agreed that they might offer B six hundred dollars for saving the iron, provided the ship should not be saved. B got the ship off and brought her to the wharf with one hundred and fifty-five tons of iron on board. It was held that the one hundred and fifty-five tons were liable to contribute in general average to the twenty-six hundred dollars, and that the rest of the iron was not; that the contract with B, having been made *bonâ fide*, was binding on the parties to the contribution, and that A should not be allowed to show that the iron might have been saved for a less sum than his proportion; and that aid rendered by A's men to those of the insurers might be set off *pro tanto* against any claim for compensation for assisting to save the forty tons.

If a ship and cargo are stranded, and at high water submerged, and abandoned to the underwriters, who decline to accept the abandonment, but raise the ship, take her to her port of destination, being the most convenient port for repairs, and deliver her cargo to the consignees, the cost of raising the ship and bringing her in is not a general average charge, and is to be computed in estimating a constructive total loss. *Ellicott v. Alliance Ins. Co.* 14 Gray, 318; *Sewall v. U. S. Ins. Co.* 11 Pick. 90.

Where a vessel was stranded, and lighters and men were, by the agreement and consent of all parties, sent to endeavor to save the property, and the vessel was lost, except a few materials, but the cargo was saved and delivered to the

The cost of the repairs themselves always rests on the ship only, unless they were of a temporary nature, and were made for the sake of the cargo, and were of no further use or benefit to the ship itself, leaving it as necessary as before to make thorough repair afterwards.<sup>1</sup>

consignees, it was held that the expenses of salvage, including the cost of lighters, &c., were general average, and that the insurers on the cargo were bound to pay their proportion of such average. *Heyliger v. New York Ins. Co.* 11 Johns. 85.

In *Bevan v. Bank of U. S. 4 Whart.* 301, where a vessel was stranded and ice-bound in a situation of imminent peril, and a portion of the cargo, consisting of specie, was carried over the ice to the shore and by land to its destination, and delivered to the consignees, and, some weeks afterwards, the vessel arrived in safety with the remainder of the cargo, which had been in whole or in part discharged into lighters and afterwards reshipped, it was held that the consignees were liable to contribute to the charges and expenses incurred after the landing of the specie, as general average. But in *Job v. Langton*, 6 Ellis & B. 779, 37 Eng. L. & Eq. 178, it was decided, on the contrary, that the expenses of getting off a stranded ship after the cargo was transhipped and conveyed to its destination, and of conveying her to a port for repairs, were not chargeable to general average, but to particular average on the ship alone. The court, however, in this case says: "All expenses incurred from the misadventure, till all the cargo has been discharged, confessedly constitute a general average. . . . We do not say there may not be a case where, after the fortuitous stranding of the ship and the cargo, unloaded, the expenses voluntarily incurred by the owners of the ship to get her off, and enable her to complete the voyage whereby the cargo, which must otherwise have perished, is carried to its destination, may be general average; as the stranding of a ship with a perishable cargo on a desert island in a distant region of the globe."

In *McAndrews v. Thatcher*, 3 Wallace, 347, 367, *infra*, p. 397. the court said, upon the point under consideration: "The settled rule is, that when a vessel is accidentally stranded in the course of her voyage, and by labor and expense she is set afloat, and completes her voyage with the cargo on board, the expense incurred for that object, as it produced benefit to all, so it shall be a charge upon all, according to the rates apportioning general average." See also *Dilworth v. McKelvy*, 30 Miss. 149, *supra*, p. 342, n. 1. See *Wilson v. Bank of Victoria*, Law Rep. 2 Q. B. 203.

<sup>1</sup> 3 Kent, Com. (5th ed.) 235, 236; *Padelford v. Boardman*, 4 Mass. 548; *Ross v. Ship Active*, 2 Wash. C. C. 226; *Jackson v. Charnock*, 8 T. R. 509; *Emerigon*, ch. 12, § 41 (Meredith's ed. p. 481); *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Plummer v. Wildman*, 3 M. & S. 482. In the case last mentioned, Mr. Justice *Bailey* said: "I doubt whether the repair of any particular damage could be placed to the account of general average, inasmuch as it is a benefit done to the ship, and if the captain could make it a general average by putting into port to repair, it would always be his interest to endeavor to do so. If, however, the repairs were merely such as were necessary to enable the ship to prosecute her

It is a universal rule in reference to the question, what expenses come under general average, that where these expenses are incurred for the exclusive benefit of any part of the common property, that alone is liable for them.<sup>1</sup> And if expenses are incurred for a common benefit, and thereafter goods which are liable to contribution are landed, and delivered to the shipper or consignee, these goods are not liable for contribution for further expenses subsequently caused. We think this the obvious result of the principles of general average, although there is an American case which seems to hold an opposite doctrine.<sup>2</sup>

voyage home, and were afterwards of no benefit to the ship, such repairs, I think, would properly come under a general average. Therefore, deducting the benefit, if there be any, which still results to the ship from this repair, the rest may be placed to the account of general average."

In a recent case, that of *Dyer v. Piscataqua Ins. Co.* 53 Me. 118, 122, the court say as follows: "To make property a subject of general average, it must have been sacrificed to avoid an impending peril, and for the benefit of all concerned. In this case it was sold to repair damage caused by a peril passed, and not for the benefit of all parties, but of one only. As we have already seen, it was the duty of the ship-owner to make these repairs, and, what is quite as important in its bearing upon the question under consideration, the repairs made were permanent, such as were needful to the vessel, and of which the owner finally had the sole benefit. If the repairs had, from the necessities of the case, been merely temporary in their nature, made for the sole purpose of enabling the vessel to proceed to a place of safety, or where repairs could be made to better advantage, or if the money had been raised to pay the expenses caused by detention on account of a peril insured against, such as wages and provisions of seamen, loading and unloading of the cargo, or any other things from which the owners of the vessel received no particular advantage, but which were alike beneficial to all, and contracted to avoid threatening danger, such repairs and expenses, and the cargo necessarily sold to pay for such, would undoubtedly be the subject of general average. This distinction properly applied, it is believed, will reconcile all the authorities upon this question, although they are apparently somewhat contradictory."

<sup>1</sup> *Vandenhevel v. United Ins. Co.* 1 Johns. 406; *Jumel v. Marine Ins. Co.* 7 Johns. 412; *Peters v. Warren Ins. Co.* 1 Story, 463, 469. In illustration of this principle, Mr. Justice Story says, in *Peters v. Warren Ins. Co.*: "If there should be a capture of a neutral ship, solely on account of the cargo, which is owned by different persons, who are shippers, if no proceedings are had against the ship, but are against the cargo only, the expenses occasioned thereby will be apportioned upon the owners of the cargo, and are but a partial loss thereof, and not a general average; for such expenses are not for the benefit of the ship or freight, which, therefore, do not contribute thereto."

<sup>2</sup> *Bevan v. Bank of U. S.* *supra*, p. 391, n. 1. This case seems to stand alone,



In a case in Massachusetts, where the expense of floating the vessel after the cargo had been landed was charged to general

the current of authorities supporting the principle stated in the text. The earliest case in which the point was involved was that of *Sheppard v. Wright*, Show. 18, which was an appeal from a decree of dismissal of a bill in the Court of Chancery. The ship of the appellants sailed from Messina for London, laden with silk and oil, and on the voyage was chased into Malaga by an armed vessel. The latter, after being in sight three or four days, stood in for the port, as if designing to make an attack on the fort, whereupon the master advised the factor of the ship-owners of the danger, who sent him lighters, to save what he could of the cargo. Because the silk was of the greatest value, it was put on board the lighter first, with a small portion of the oil, and carried ashore. At night the French vessel left the port, whereupon no more was landed. About six days afterwards, the French fleet appeared again before Malaga, and, notwithstanding the efforts of the seamen, took the ship and carried her away. The silk was afterwards put on board another ship and delivered to the respondents at London, for which they paid the freight, &c. The appellants, being the owners of the ship and oil, brought their bill against the respondents, who were the owners of the silk, to compel contribution. But the Court of Chancery dismissed the bill, and the decree was affirmed upon appeal by the House of Lords. The ground of the decree was, that the appellants' loss did not save the silk. The whole adventure was saved from the first peril, and the silk was not exposed to the second, by which the ship and the oils were lost. The court in *Bevan v. Bank of the U. S.*, commenting upon this case, remarks: "The decree may be correct, because it is perfectly clear that the safety or the preservation of the silks was not owing to the loss of the ship and the oil, or of either." It is difficult to see why the same reason would not defeat the claim for contribution in the case then before the court; for it is clear that the preservation of the specie was not owing to the expenses incurred after it had been landed. In the case of *Job v. Langton*, 6 Ellis & B. 779, 37 Eng. L. & Eq. 178, a ship, having sailed from Liverpool with a cargo on board, accidentally went ashore on the Irish coast. In order to get her off it was necessary to discharge the whole of the cargo, which was accordingly taken out and placed in store in Dublin. The ship was then got off by digging a channel for her, and employing a steam tug, and was towed to Liverpool to be repaired. The cargo was shipped in another vessel, and forwarded to its destination; but, for the purposes of the case, was to be considered as having been carried on by the original ship after she had been repaired. It was held that the expenses after the cargo was in safety, in getting off the ship and towing her to Liverpool for repair, were not chargeable to general average, but to the ship alone. Lord Campbell, C. J., said: "We do not see how these expenses are to be distinguished from the expenses of repairing the ship when she had been brought to Liverpool, which, it is admitted, must fall exclusively on the owner of the ship or the underwriter on the ship, as particular average. If the owner of the ship was to earn the stipulated freight by carrying the cargo to Newfoundland, it was his duty to repair her and to carry her to a place where she might

average, the decision may be accounted for, perhaps, by the fact that the circumstances of the case did not make it important

be repaired. Mr. Blackburn's position, that, the end in view of every maritime adventure being the arrival of the ship with her cargo at her destination, extraordinary acts done to effectuate this give rise to general average, would justify him in contending that these expenses do not constitute particular average; but, unfortunately for him, the expenses incurred in repairing the ship at Liverpool, according to this reasoning, would equally be general average; for the repairing of the ship was an extraordinary act which was necessary for the arrival of the ship with her cargo at Newfoundland, and was as much for the joint benefit of ship and cargo as bringing her to Liverpool from Malahide Bay. Under the circumstances stated, after the cargo had been safely discharged and warehoused, it does not even appear that it was for the advantage of the owner of the cargo that the *Snowdon* should be got off the strand and repaired. Of course we do not, contrary to the intention of the parties, attach any importance to the fact that the cargo was forwarded in another vessel; and we shall give our decision as if the *Snowdon*, after being repaired, had carried the cargo to its ultimate destination. But, in the absence of any statement to the contrary, we might infer (as the fact turned out to be) that there would be no difficulty in forwarding the cargo by another vessel. . . . In the present case the owner of the ship, after the cargo was discharged, appears to us to have done nothing except in the discharge of his ordinary duty as owner, and for the exclusive benefit of the ship. Notwithstanding some expressions of Lord *Ellenborough* in *Plumer v. Wildman*, 3 M. & S. 482, 486, we consider it quite settled that, by the law of this country, the expenses of repairing the ship, or, after the cargo is safe, of bringing her to a place to be repaired, cannot, under such circumstances, be made the subject of general average." The claim for general average would seem to have been stronger in this than in the case of *Bevan v. Bank of U. S.*, because here the cargo was considered as having been carried on by the ship after she had been repaired; the cargo and ship had not been separated, as in the latter case, before the expenses were incurred; therefore it was for the interest of the cargo that these expenses should be incurred, which cannot be said of the latter case. In *Moran v. Jones*, 7 Ellis & B. 532, a ship was chartered to proceed from Liverpool to a foreign port. She took on board an outward cargo and sailed. She was driven on a bank by a storm, near Liverpool; and the cargo was rescued from her, and carried to Liverpool, and there warehoused, the ship still remaining ashore in a situation of peril. Some days afterwards the ship was got off and taken to Liverpool, where she was repaired, and again took the cargo on board, and proceeded on her voyage. The question for the court was, whether the expenses incurred, after the goods were in Liverpool, in getting the ship off, without which she could not have proceeded on her voyage or earned the chartered freight, were general average to which ship, freight, and cargo were to contribute; or were chargeable to ship alone; or were chargeable on any other principle. The court drew the inference of fact, that the whole saving of the cargo and ship was one continued transaction; and, on that hypothesis, held that the expenses were general aver-

that the several interests should be treated distinctly and separately.

age to which ship, freight, and cargo must contribute. The same remarks apply to this case as to that of *Job v. Langton*. The expenses were requisite to the continuance of the voyage; they were incurred before the cargo had reached its destination and become permanently separated from the ship; it was therefore for the interest of the cargo that they should be incurred. In *Nelson v. Belmont*, 5 Duer, 310, one of the questions raised was whether the specie which was transferred to the Danish brig was liable to contribution for the expenses and loss subsequently occurring. This question was there decided in the affirmative. Upon this point an appeal was taken to the Court of Appeals, 21 N. Y. 36. The decision of the court below was affirmed, but the court said: "My conclusion is, notwithstanding the case of *Bevan v. The United States Bank*, that if the owner of any portion of the cargo, even after a peril has occurred, and after a series of measures to avert it have been commenced, can succeed in so separating his own property from the rest that it is no longer in any sense at risk, he cannot be held liable to contribute to the expenses subsequently incurred. But, in order rightly to apply this rule, it is necessary to ascertain the full scope of the term 'at risk. Physical destruction, or direct physical injury to the ship or cargo itself, is not the only risk to which property so situated is exposed. Its value depends, or at least is supposed to depend, in some degree, upon the successful prosecution of the voyage. Whatever threatens the voyage, therefore, is a peril to the entire property. Until that is broken up, unless the property claimed to be exempt is not only separated from the rest, and put in a place of present safety, but entirely disconnected with the enterprise, it must be regarded as still at risk and liable to contribute. If the voyage is not abandoned, and the property, although separated from the rest and removed from the ship, is still under the control of the master, and liable to be taken again on board for the purpose of being carried to its destined port, the relations of the several owners are in no respect changed. The common interest remains; and whatever is done for the protection of that common interest must be done at the common expense. . . . If the captain of the *Galena* had put the specie on board the brig, not in any event to be returned to him, but to be taken by the brig to its own port of destination, and the latter had then been suffered to pursue its course, the specie would clearly not have been subject to contribution for any subsequent expenditures to save the *Galena*. And notwithstanding the brig was employed to attend the *Galena* to Charleston, if it had been distinctly understood between the two commanders that the specie was committed entirely to the custody of the Danish captain, and was in no event to be restored to the care of the captain of the *Galena*, it would then also have been exempt. But the facts do not warrant this assumption. The case states that 'the specie was put on board the brig because it was safer there, as, in case the fire broke out, it might be too late to transfer it from the ship.' The brig was to accompany the *Galena* to Charlestown, and there is nothing from which it can be inferred that it was the intention of the captain of the latter to relinquish his control of the specie. The fact that he reclaimed and took it from the brig as

A ship may be detained for other causes than the necessity of repair ; and it may sometimes be difficult to determine whether

soon as he arrived in Charleston tends strongly to the opposite inference. It never ceased, therefore, up to that time, to constitute a part of the cargo of the *Galena* ; and if the fire had been previously extinguished, and the voyage resumed, it would of course have been again taken on board and carried forward by her." In *Bedford Ins. Co. v. Parker*, 2 Pick. 1, *supra*, p. 391, n. 1, *Parker*, C. J., said : " The owners of the cargo had a right to save as much of it as they could, and ought not to be held to pay, on account of what was saved, any part of the expenses which subsequently occurred." The court in *Nelson v. Belmont* quotes this passage, and remarks : " This decision, which has been uniformly approved, appears to me to be in strict accordance with the principles upon which the doctrine of general average rests."

In a very recent case, that of *McAndrews v. Thatcher*, 3 Wallace, 347, this question came before the Supreme Court of the United States and was settled in accordance with the authorities above cited. The facts were as follows ; A ship was stranded near her port of destination, and the underwriters upon her cargo sent an agent to assist the master in getting her off. The master and agent made all proper efforts to do this, for two days, when, not succeeding, and the water increasing in the hold, they began to discharge the cargo in lighters, still making efforts to save the ship. The discharge of the cargo occupied four days ; by which time the whole of it was taken out — with the exception of a small portion in the lower hold which was overlooked — and taken to the ship's agents, who afterwards delivered it to its consignees, they giving the usual average bond. By the time that the cargo was thus all got off, the vessel, not assisted by being lightened, was settling in the sand, with the tide ebbing and flowing through her as she lay. The agent, considering her case hopeless, and the consignees of the ship having refused to authorize him to incur any further expense, now went away. On the next morning, and while the master was yet aboard, the underwriters on the vessel sent their agent, who got to work to float the vessel. Soon after the new agent came, the crew refused to do duty. The agent got new hands, and the crew went away. They were soon followed by the master, he leaving the vessel after the new agent had been in charge of her for four days. After six weeks' labor, and an expenditure of money somewhat exceeding her value when saved, the new agent succeeded in floating and rescuing the ship. The remnants of the cargo, in a damaged state, were delivered to its consignees. This action was brought by the owners of the ship against the consignees of the cargo for contribution for the expenses incurred after the master went away ; but it was held that there was no ground for contribution, as it was considered that no community of interest remained between the ship and cargo after the master left the ship. We make the following extracts from the opinion of the court : " It is an undoubted rule that goods, or any interest, are not liable to contribute for any general average or expenses incurred subsequently to their ceasing to be at risk ; because all that was not actually at risk at the time the sacrifice was made or the expense incurred was not saved thereby, and no interest is compelled to

they come under the law of general average. A useful test is frequently found in the question, whether the delay or detention was voluntary, for, if not, there can be no average. It may be said that if a master is compelled by disaster to seek a port of repair, he has no choice; this, however, is not true, for, if he chose, he might always attempt to go on his course with such means as he had. But if the ship is detained on her voyage by an embargo, there is no element of a voluntary sacrifice, and the weight of American authority, although it is not uniform, is against any claim for contribution for wages and provisions or other expenses caused by such detention.<sup>1</sup> So if she

contribute to the loss or expense which was not benefited by the sacrifice. . . . Where the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladed and stored in safety are not relieved from contributing towards the expenses of saving the residue, nor is the cargo, in that state of the case, relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures. . . . Such are the undisputed facts of the case, and, under the circumstances, it is not possible to hold that the ship, as subsequently got off, was, as matter of fact, saved by a continuation of the same series of measures as those by which the cargo was saved. Complete separation had taken place between the cargo and the ship, and the ship was no longer bound to the cargo nor the cargo to the ship. Undoubtedly the doctrine of general average contribution is deeply founded in the principles of equity and natural justice, but it is not believed that any decided case can be found where the liability to such contribution has been pushed to such an extent as that assumed by the plaintiffs." See further *The Ann D. Richardson*, Abbott, Adm. 499; *Sparks v. Kittredge*, U. S. D. C. Mass. 9 Law Rep. 318.

<sup>1</sup> *Penny v. N. Y. Ins. Co.* 8 Caines, 155; *Harrod v. Lewis*, 3 Mart. La. 311; *Jones v. Ins. Co. of N. A.*, 4 Dall. 246. The decision in the last-named case has, however, been overruled. See *Ins. Co. of N. A. v. Jones*, 2 Binn. 547. Magens says that, in a war between England and Spain, a fleet of merchant ships from Carthage and La Vera Cruz were detained by order of the Spanish court above a year at Havana, and that, notwithstanding the expense of maintaining a ship's crew there ran very high, yet the owners of the ships in Spain had no recourse against any of their insurers nor against the proprietors of the cargo; for they considered it as an accidental occurrence, or mere chance, wherewith the insurers had nothing to do. He adds: "Vernier, in examining the question whether such a detention by a foreign power ought to be brought into a general average or not, very properly replies by proposing another query, 'Why should victualling and men's wages be deemed a general average, rather than interest of money, and the damage caused to goods by such a delay?'" 1 Mag. 68. Upon the point whether wages and provisions are a subject of general average, there

was necessarily delayed by quarantine,<sup>1</sup> or while waiting for convoy.<sup>2</sup>

As a general rule, it may be said that no expenses of delay or detention, if the detention takes place before the voyage begins, give any claims for contribution ; for this only suspends the

is no distinction between the case of an embargo and a hostile seizure. *Spafford v. Dodge*, 14 Mass. 66. These expenses during an embargo do not go into a general average, nor are they covered by a policy upon the ship. *McBride v. Mar. Ins. Co.* 7 Johns. 431 ; *Robertson v. Ewer*, 1 T. R. 127 ; *Martin v. Salem Ins. Co.* 2 Mass. 429. In *Da Costa v. Newnham*, 2 T. R. 407, which was a case of a ship going into port for repairs, and the question being raised whether the wages and provisions of the crew should be compensated for in general average, Mr. Justice Buller said : " As to the wages and provisions, this is not like the case where a ship is detained by an embargo, where the court have said that the expense shall fall on the owner only, and the freight must bear it." See also Pothier, *Traité des Chartes-Parties*, No. 85 ; Ricard, *Négoce d'Amsterdam*, p. 279. Lord *Tenterden*, upon this subject, says : " And this case does not seem to fall within the principle of the Rhodian law, because here the delay does not proceed from the act of the master or persons belonging to the ship ; nor is it for the general benefit." Abbott on Shipping, 499. Another reason is that, in such case, neither ship nor cargo is in actual jeopardy ; for as Beawes expresses it, " the embargoing sovereign would not have either ship or cargo, but only hinders their departure." 2 Arnould on Ins. 913.

<sup>1</sup> Stevens & Benecke on Av. (Phillips's ed.) 165 ; Emerigon, tom. 1, p. 633 ; *Kingston v. Girard*, 4 Dall. 274. Upon this point Magens speaks as follows : " When in the Hamburg Ordinance, No. 983, it is said that charges occurring by any extraordinary quarantine, or unavoidable accidents, shall be brought into a general average, it must only be understood of such extraordinary charges as accrued from a voluntary endeavor for the better security both of ship and cargo, but not, as in the same ordinance, No. 901, is justly distinguished, for sailors' victuals and wages when they are under a necessity of performing quarantine with the ship, in which case the master would have been obliged to maintain and pay them, though his vessel had arrived only in ballast." 1 Mag. 67.

<sup>2</sup> Stevens & Benecke on Av. (Phillips's ed.) 149 ; Bynkershoek, *Questiones Juris Privati*, lib. 4, c. 25. Referring to one of the cases mentioned by Bynkershoek, where the claim for contribution toward these expenses was allowed, Lord *Tenterden* says : " In this case it is to be observed, that the master put into port to avoid an extraordinary and impending peril, and not merely as a matter of general caution to avoid the ordinary dangers always accompanying a state of warfare. And the expense thus incurred appears perfectly analogous to the cases of jettison, and to fall within the principle of the Rhodian Law. For in this case as the learned author observes, it is clear that there was a present and impending peril, and it is clear, also, that the voyage was delayed, not by an accident, but by design, in order to avoid the peril." Abbott on Shipping, 500.

voyage. The master is bound to have his ship in readiness. It is the duty of the owner to have his ship ready for the voyage, at the proper time, and anything which is a mere hindrance or detention of her sailing is his loss only, even if it be not his fault. It is, however, always possible that before the voyage begins, or during the detention by embargo, or quarantine, some expenses are properly incurred for the common benefit. They might come under the law of average, and certainly would do so if they were made necessary by some extraordinary exigency, and no necessity or advantage belonging to any one interest alone would have caused the expenses. So we have said that wages and provisions and other expenses, to obtain the release of a captured vessel, are averaged, if the vessel and cargo be released.<sup>1</sup> This is the general rule founded upon that principle of the law of average which requires that the sacrifice should be successful. But it is here also possible that expenses may be incurred for the common benefit in such a way that they should be paid for by the whole property, although there is no ultimate release.

Where funds are so raised for the common benefit as to become a general average loss, the interests assisted must contribute, not only for the amount raised, but for incidental expenses necessarily incurred in raising the funds, as commissions, premiums, extra interest, brokerage, and the like.<sup>2</sup> And so, if they are raised by

<sup>1</sup> *Jumel v. Mar. Ins. Co.* 7 Johns. 424; *Kingston v. Girard*, 4 Dall. 274; *Leavenworth v. Delafield*, 1 Caines, 573; *Sharp v. Gladstone*, 7 East, 24. See *supra*, p. 387, n. 1.

<sup>2</sup> So stated by all text-writers; as 2 Phillips, sec. 1326; 2 Arnould, 917; Benecke & Stevens on Av. (Phil. ed.) 172. Interest upon the amount of a contribution for general average runs from the time the money was advanced upon which the average arose. *Sims v. Willing*, 8 S. & R. 103.

Benecke says: "The several charges, necessarily incurred in consequence of a measure taken for the benefit of the whole, must also, without contradiction, be admitted as general average. The most material of these are the expenses occasioned in raising the necessary funds in a port into which a vessel has been driven in distress. . . . So much of the charge of procuring funds as corresponds with the sum actually employed for the purposes of the general average, and no more, can be admitted; and it is a gross abuse when, as is sometimes done, the whole of the charges for obtaining funds, such as marine interest, &c. are passed to the general average account, although a part of those funds have been employed for a particular average on the vessel, or for the restitution of other partial damages. This applies also to commissions of agents, attorneys, surveyors' fees

a respondentia, or by hypothecation of the goods, instead of by the sale of them, the maritime interest must be paid.<sup>1</sup>

If the goods thus hypothecated are lost, as the owner of the goods loses nothing by the bond, that being discharged by the loss of goods, he has of course no claim for contribution.

If the master hypothecates the cargo alone for necessities of the ship and cargo jointly, and the ship is lost, the ship-owner, who loses nothing but what he would have lost if no hypothecation had taken place, can have no claim upon the owners of the cargo for contribution. But how is it if the goods are saved and applied to the payment of the bond? It is of course admitted that if the master of a vessel, being obliged to put into a port of distress, has no money to pay for the repairs, and can raise none on the personal credit of the owner of the vessel, he may hypothecate the ship and cargo for that purpose. The question then arises in what case can the owner of the goods hypothecated call on the other shippers for a general average contribution. If another ship can be found to take the goods on, although the master has the right to detain them till his own ship is repaired, still, in such a case, the detention would clearly not be for the benefit of the goods, and it would seem that the other shippers should not contribute; but when no other vessel can be obtained, and the ship cannot proceed and complete the voyage without repairs, and there are no means of making them except by a hypothecation of the cargo, and this is done, we are strongly inclined to the opinion that the expense which is thus incurred should be made good by a general average contribution.<sup>2</sup>

brokerage, postage, and other similar charges." Benecke, Prin. Indem. 243. Where expenses have been incurred, the insurers are not liable for marine interest, but only for the ordinary legal interest on the sums advanced. *Jumel v. Mar. Ins. Co.* 7 Johns. 412, 425.

<sup>1</sup> Stevens on Av. 27 (5th ed.); Benecke, 283.

<sup>2</sup> This is clearly the opinion of Lord *Stowell*, in the celebrated case of *The Gratitude*, 3 Rob. Adm. 240, 264, in which, after stating that all must finally contribute in the case of an actual sale of a part of a cargo, he adverts to the case of a hypothecation of the whole, which he considers equivalent to a sale of a part, and says: "All contribute in this, as a portion of the whole value of the cargo is abraded for the general benefit, probably with less inconvenience to the parties than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance." See also *The Constanca*, 4 Notes of Cases, 677; *The Ship Packet*, 3 Mason, 255.



The master, if by reason of wreck or other cause he is unable to carry the goods to their destination in his own ship, always may, and by the weight of American authority must, if he can, transship the goods or send them to their destination in another bottom.<sup>1</sup> The expense incurred by doing this is not a general average loss, but falls on the cargo or on the ship, according to the circumstances of the case.<sup>2</sup>

There are cases in which claims for compensation arise which should be settled by the same computation as a general average loss; but we should not give this name to them. Such might be the case where a claim arose from compensation for the destruction of property which was not at risk nor owned by any one who had an interest in ship, cargo, or freight, or even if the property was not in any sense maritime. If, for example, it should be necessary for the purpose of saving from fire a ship with her cargo, which lies immovable at a wharf, to destroy property, whether another ship, or a building, or anything else, and this is done by any one of the owners of the endangered ship or cargo, or by any person for him, it must be paid for by the party who does it; and then this payment might give rise to a claim for compensation in some form, against all the interests saved by it.

We may reverse the case, and suppose an injury inflicted upon the common property by one either in wrong or for good reason, but such as gives to all who suffer a claim for indemnity. If this claim be enforced, the expense of doing so would be so far like that of general average, that none should be entitled to their share of the benefit who did not advance or repay their share of the cost. But the right to contribution, strictly so called, does not extend beyond those who voluntarily embark in a common adventure; and if A's vessel is about to come into collision with B's, which is at anchor, and B cuts his cable, and thus avoids it, he has no claim for contribution under the law of general average against A for the loss of the cable and anchor.<sup>3</sup>

<sup>1</sup> All the authorities agree that the master has the *power* to send the goods on in any other ship, if his own be lost, but it has been doubted whether it is his duty so to do. This question we consider *ante*, p. 234, n. 2.

<sup>2</sup> *Heyliger v. N. Y. Firemen Ins. Co.* 11 Johns. 85. See also *Lyon v. Alvord*, 18 Conn. 66.

<sup>3</sup> *The John Perkins*, U. S. C. C. Mass. 1857, 21 Law Rep. 87, 97.

## SECTION IX.

## THE SACRIFICE MUST BE SUCCESSFUL.

The third essential of a general average loss, namely, that the sacrifice should be successful, rests upon a reason which is perfectly obvious. The foundation of the law of general average is, that if A's property is saved by the sacrifice of B's property, the sacrifice having been made and intended, A should compensate B therefor. And if A's property is not saved, he is in no way benefited by the sacrifice, and is therefore under no obligation to make compensation for it.<sup>1</sup> The general rule itself has never been questioned, but some subordinate questions under it have been raised. If, for example, the vessel is saved by the jettison, but is afterwards lost, is contribution now due? It is said that it is due, unless the peril which caused the sacrifice was the same peril which afterwards destroyed the property that had been temporarily saved.<sup>2</sup>

<sup>1</sup> *Scudder v. Bradford*, 14 Pick. 18; *Bradhurst v. Col. Ins. Co.* 9 Johns. 9; *Gray v. Wain*, 2 S. & R. 229, 255; *Sims v. Gurney*, 4 Binn. 513, 524; *Williams v. Suffolk Ins. Co.* 3 Sumner, 510; *Rossiter v. Chester*, 1 Doug. Mich. 154; *Whitteridge v. Norris*, 6 Mass. 125.

<sup>2</sup> *Lee v. Grinnell*, 5 Duer, 400. In this case the sails, masts, and spars of a ship being on fire, and their destruction certain, the masts, for the preservation of the ship and cargo, were cut away. A spar which was on fire, in falling, pierced the decks, and set on fire both ship and cargo in the hold and between decks. The ship was scuttled, and sunk ten feet, when she struck bottom. Every available means was used to extinguish the fire, but without success; and she continued to burn for two days, when the fire, having reached the water's edge, was put out. The ship was found to be so badly injured as to be unworthy of repairs, and was therefore condemned. The judges, though differing upon the question whether the cutting away of the masts, &c. was a voluntary sacrifice entitling the owners to contribution, agreed in holding that, as the effect of the cutting away was not to preserve any of the property at risk, for any period of time, from the peril in which it was involved, the loss of the masts was not a subject of general average. Judge Duer remarked (p. 411) that it was unnecessary to decide whether the cutting away of the masts and spars was a voluntary sacrifice of property having value; since, if a sacrifice, as it had contributed in no degree to the preservation of vessel and cargo, it was not a subject for compensation by those who had derived no benefit from the act; and Judge *Hoffman* said (pp. 421, 422): "I consider the true rule to be, that the achievement of the object designed even for a very short period of time, will be sufficient to justify contribution, notwithstand-

It has been held to be a consequence of this rule, that, where repairs have been made which were necessary for the safety of the

ing a subsequent loss, provided the ultimate loss results from a new peril. . . . Thus the question is, Was the peril which rendered the sacrifice useless a continuation of the same peril which led to it, or was it a new disaster? The fire, which induced the act of destruction, was transferred, with the blazing spar, from above to the hold below, and there continued and spread itself. It seems difficult to say that this was different from the continuation of the same tempest, which, by rendering the sacrifice fruitless, displaces a claim to contribution; and it follows that no claim exists in the present case for that damage which, though caused by a voluntary act, did not in reality avert or diminish the peril."

Where the master of a vessel which was dragging her anchors towards the shore cut away the masts to prevent her drifting, and thereupon she brought up, but after about an hour drifted again and was wrecked, it was held that the cargo which was saved was not liable in general average, inasmuch as the sacrifice of the masts did not rescue it from the particular peril then impending. *Scudder v. Bradford*, 14 Pick. 13. In giving the opinion of the court, *Putnam, J.*, said: "The property saved from the danger which was immediately threatening shall be held to contribute, notwithstanding it may be lost by subsequent perils in the course of the voyage. . . . The only hope was that, by the cutting away the masts, the anchors might bring up the ship, and prevent her drifting towards the shore. If that measure had succeeded, this would have been a case for a contribution; but it did not succeed. In about one hour after the masts were cut away the ship drifted, and dragged her anchors, until she reached and was wrecked upon the rocky shore. It cannot be affirmed that the property which was saved from the wreck was saved by the means of the cutting away of the masts. The forlorn hope failed. There was no more benefit derived from cutting away the masts before she reached the shore than from the slipping of the cables afterwards. It cannot be said that the property was safe or saved during the short space of time that she was brought up. The sea continued to set and roll with violence towards the shore, until the anchors were dragged as before. It was one continued peril, which was not avoided by the voluntary destruction of the masts. If the anchors had brought up the ship after the masts had been cut away, and had held her until the then impending peril had ceased, and the ship had proceeded upon her voyage, and been lost afterwards from other perils, the contribution would be due. For this general average is to be paid once or oftener, although the ship should be finally lost on the same voyage by subsequent and distinct perils. To apply this rule: suppose the claim should have been made within the hour that the anchors held the ship after the masts were cut away. The answer would be obvious. Wait, and see if the ship will ride out this perilous swell of the sea: if she does, then call for your average. If she does not, this well-intended damage to the ship must go for nothing, as no benefit or safety will be derived from it. The answer is certainly as good now as it would have been then. The sacrifice was of no avail, and cannot be the legal foundation of a claim for contribution. What was saved was saved *tantum ex incendio*." In

whole property, the expenses of these repairs, and those arising from delay or deviation for the repair and the wages and provisions expended, would constitute a general average loss only where these repairs enable the ship to resume her voyage.<sup>1</sup> They must not only be needed to enable the ship to go forward and carry the cargo to its original destination, but they must be effectual for this pur-

*Lewis v. Williams*, 1 Hall, 430, a vessel was stranded near her port of destination, and, for the purpose of relieving her, the cargo was put into lighters and forwarded. The vessel and cargo were thereby relieved from the peril they were in by the stranding, and the cargo reached its destination; but the brig was eventually lost by a new peril. During the passage in the lighters, a portion of the defendant's goods were damaged, for which he recovered contribution. The plaintiff, having been obliged to contribute to this loss before he could get possession of his goods, now sought to recover the amount so paid, on the ground that he was not liable to contribution because the ship afterwards perished before the voyage was ended. But it was held, that as the vessel, freight, and cargo all derived security from the exposure of the defendant's goods in the lighters, the purpose for which such exposure was made was fully answered; and that, as the defendant's loss was the direct consequence of such exposure, all the parties benefited should contribute to indemnify him. The court said: "It is conceded to be a general rule that contribution is not due for a jettison, or for damage from the exposure of part of the cargo, unless the ship and remaining cargo have been rescued from the peril to which they were exposed; but it is a mistake to suppose that the ship must pursue her voyage, or arrive at some port in safety, to entitle the party whose goods have been sacrificed to contribution for the loss. If indeed the ship, after the jettison, perishes in the same storm, the rule applies, and there shall be no contribution for the goods that may be saved to the owners of those that were thrown overboard; because the object of the sacrifice, which was the safety of the ship from the storm, was not attained. But if the ship escape the peril which the jettison was intended to eschew, and is afterwards lost by another accident or disaster, the effects saved from the last disaster shall contribute to the loss or damage incurred in averting the first peril, because that sacrifice once saved them from danger."

If the ship survives the danger which the jettison was made to avert, and is totally lost even the next day, the goods saved shall contribute to the loss of the part thrown overboard, notwithstanding the entire destruction of the voyage. *Caze v. Reilly*, 3 Wash. C. C. 298, 305.

<sup>1</sup> *Williams v. Suffolk Ins. Co.* 3 Sumner, 510, 513, 514; *Myers v. The Harriet* U. S. D. C. East. Dist. Penn., 2 Wharton's Dig. p. 48, tit. Ins. 140; *Nelson v. Belmont*, 5 Duer, 310, 325.

It was said in the case last cited that where the expenses were incurred with a view to decide in regard to the resumption of the voyage, they might perhaps be a subject of contribution; and so, where the vessel had been scuttled to save the cargo from destruction by fire, if the cargo had been afterwards taken out in order that the water might be pumped out.

pose. It is not enough that these expenses were intended for the common good, but they must also result in the common benefit.

This rule has been applied in one important case, where the vessel was captured, and the voyage broken up and abandoned, but the ship returned home; and it was held that no expenditure occurring after the capture could be averaged, because none of it was successful.<sup>1</sup>

If, however, any portion of the cargo is rescued with the ship, the rescue being successful as to this part, the cargo saved would be bound to contribute towards that part of the expense which was incurred for its benefit in common with that of the ship and freight.

A distinction has been taken between a case in which expenses have been incurred for the safety of the property by a party justified in acting as agent for the owner of the property, and a case which comes more properly under the law of general average. It may not be always easy to draw the line between these cases, but the difficulty is not in the principle itself, but in its application. If we suppose, for example, that the vessel is captured and taken into port, if the master merely as master expends money to obtain the release of the ship and cargo, and is successful, and the ship and cargo being released return home, this expense is a general average loss;<sup>2</sup> not so, however, if he is wholly unsuccessful, the ship and cargo not being released. But if agents of the ship-owner and the shippers in that port concur in expending money to obtain a release of the whole property, all the owners of the property captured are equally responsible for the expense, whether the efforts for release are successful or not, and it may be that the master in such a case might have authority to act as the agent of all so interested, and might so act.<sup>3</sup>

<sup>1</sup> *Williams v. Suffolk Ins. Co.* 3 Sumner, 510, 513, 514.

<sup>2</sup> *Spafford v. Dodge*, 14 Mass. 66, 74, *supra*, p. 387, n. 1.

<sup>3</sup> Thus Mr. Stevens, in his work on General Average (Phillips's ed.), p. 74, says: "It will occur to every one in the habit of considering questions of this nature, that there is an essential difference between a claim for *restitution* and for *recompense*. In the former case, e. g. in that of jettison, if at any subsequent period of the voyage the remainder of the cargo be lost, there is no claim to replace that part which was jettisoned, — and the same if the *ship* be lost before the articles sacrificed were replaced. But in the case of expenses incurred with

It has been repeatedly declared, that a loss or expense, to constitute a general average claim for contribution, must have caused the safety of the contributory property. The French code of commerce,<sup>1</sup> adopting the rule of the Roman law,<sup>2</sup> asserts this. So say Valin<sup>3</sup> and Beawes.<sup>4</sup> So also it was held in Pennsylvania<sup>5</sup> and in Massachusetts,<sup>6</sup> and indeed similar language is frequently used.

a view towards the general benefit, it is clear that they ought to be made good to the party, whether he be an agent employed by the master in a foreign port or the ship-owner himself. The former is a case lying strictly within the adventure; for if a part be sacrificed, and the remainder be lost, the whole is lost. But in the latter case the expenses are *extraneous*, and were incurred under an implied obligation of indemnity on all parties, which is one of the duties each of the parties who are joined in a sea adventure takes upon himself." The well-established doctrine is, that disbursements for the common safety must be reimbursed in general average, whether the ship and cargo are eventually saved or not. See also *Spafford v. Dodge*, 14 Mass. 66, 77, *supra*, p. 387, n. 1; *Hassam v. St. Louis Ins. Co.* 7 La. Ann. 11.

<sup>1</sup> Cod. de Com. l. 2, t. 12, a. 234; Ord. tit. Du Jet. a. 15.

<sup>2</sup> Dig. 14, 2, 4, 1. "Eorum enim merces non possunt videri servandæ navis causa jactæ esse, quæ periit."

<sup>3</sup> Vol. 2, p. 205, Du Jet. a. 15, and p. 207, a. 16.

<sup>4</sup> Beawes, tit. Salvage, Average, &c.

<sup>5</sup> *Sims v. Gurney*, 4 Binn. 513, 524. Here a ship, being in distress, for the common safety went ashore near Cape May, damages being thereby incurred for which general average was claimed. In speaking of the requisites of such a claim, *Tilghman*, C. J., said: "It is sufficient if a *certain loss* is incurred for the common benefit. It seems at first view not very reasonable that contribution should be asked for damage occasioned by an act which in fact was for the benefit of the ship. But the law is certainly so, provided the act which occasioned the damage was conducive to the common safety. . . . But did the standing towards Cape May conduce to the common benefit? It is extremely difficult to say whether it did or not. One thing, however, is certain, that, as the matter turned out, the crew and cargo *were entirely saved*. Whether that would have been the case, had any other course been pursued, it is impossible to decide with absolute certainty. It was a question, however, very properly submitted to the jury, and they have found in the affirmative. Taking it, then, that the ship was run upon the ridge with a view to the common good, and that it was conducive to the common good, it follows that not only the damage sustained on the ridge, but also at Cape May, must be the subject of general average, because the damage at Cape May was the necessary result of running on the ridge."

<sup>6</sup> *Scudder v. Bradford*, 14 Pick. 13, *supra*, p. 404, note. In stating what was essential to sustain a claim for contribution, the court said: "It must be proved that the sacrifice was necessary and voluntary; it must be intended for the safety of all concerned, and it must appear that thereby the property which is to contribute was rescued from the imminent peril then impending."

And yet the rule seems to require some qualification. If we suppose the ship on shore under the circumstances which require a jettison, and this jettison is accordingly made, and then by some extraordinary rise of the tide, or favorable action of the wind, the ship is got off in safety, and it is plain that the ship and cargo would have been saved as well without the jettison, this rule would determine that the jettison should not be contributed for. We must agree with Marshall, "this is quite unreasonable and unjust."<sup>1</sup> In a case decided by Mr. Justice Washington, he asserts, as it seems to us with great reason, that "the principle fairly to be extracted from the maritime law is, that the part saved shall contribute, provided the object for which the sacrifice was made was attained."<sup>2</sup>

It would seem that this was a material qualification of the rule requiring the object for which the sacrifice is made to be attained *by means of that sacrifice*. We think the general use of language to the contrary has arisen from the fact, that, in a vast majority of the cases in which property is sacrificed to save the rest and the rest is saved, it is saved by means of the sacrifice.

<sup>1</sup> Marshall on Insurance (London ed. 1802), p. 462.

<sup>2</sup> *Caze v. Reilly*, 3 Wash. C. C. 298, 302. In this case, a schooner, on a voyage from France to Philadelphia, being chased by a British frigate, and her capture being deemed inevitable by the captain, was, with the advice of the officers and crew, run on shore at Long Branch, N. J. Before the enemy could board her, a large part of the cargo was saved, after which she was burnt. The master claimed to retain the goods saved, as subject to freight, general average, and expenses, and the claim was allowed. The court, after stating the principle quoted in the text, continues: "This principle is not inconsistent with the rule contended for by the plaintiffs' counsel, that if a jettison be made, and the ship saved, there shall be contribution; but if the ship be lost, there shall be none. That rule is correct in all its parts, when applied to a mere case of jettison. But the principle of it is equally applicable to a loss voluntarily incurred by the ship, for the common safety, if safety be thereby attained. . . . The reason assigned in the Rhodian Law, why contribution should be made, in case of a jettison of goods, is so entirely applicable to that of loss, or injury incurred by the vessel, under the same circumstances, that it becomes those who would distinguish them to point out the difference. That reason is, that all should contribute to a loss, occasioned by the jettison, for the sake of lightening the vessel, because it was done for the benefit of all. If so, and the ship expose herself to loss, for the sake of obtaining safety for all, and, in consequence of such voluntary exposure, she is lost, why should not all contribute to repair the loss?"

## SECTION X.

## THE SACRIFICE MUST BE NECESSARY.

Where the sacrifice of property is not called for as a means of escape from impending peril, it is mere waste and wrong-doing, and of course can give no claim for contribution.<sup>1</sup> Formerly, to guard against this waste, the master was obliged to consult his officers and crew in a formal manner, and only by their consent was he justified in making a jettison of the cargo.<sup>2</sup> But the rule

<sup>1</sup> The *Gratitudine*, 3 Rob. Adm. 240, 258. Mr. Justice *Curtis*, in *Lawrence v. Minturn*, 17 How. 100, 110, speaking of the necessity which would authorize the master to make a jettison, said: "If he was a competent master; if an emergency actually existed calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, — the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person to whom the law has intrusted authority to decide upon and make it has duly exercised that authority." See also *Patten v. Darling*, 1 Clifford, C. C. 254. On the other hand, there is a *dictum* by *Coulter, J.*, in *Myers v. Baymore*, 10 Barr, 114, 118, to the effect that if the goods are thrown overboard unnecessarily by the master, although he acts with the most honest intention of saving the vessel, there is no claim for general average. Although this is the law relative to the power of the master to sell the vessel, we should doubt its applicability to the case of a jettison. In *Lawrence v. Minturn*, the vessel had met with a gale and was severely strained by the weight of the deck-load. After the gale abated, and when the sea was calm, and the vessel in no immediate danger, the master, officers, and crew made a protest, setting forth the above facts, and asserting that the deck-load was unsafe, and that it should be thrown over as soon as possible. This was accordingly done. It appeared that the goods were of such a nature that they could not be thrown overboard without the greatest risk, when there was any considerable sea. It was held that the jettison was justifiable. The court said: "Precautions against dangers which are certain to occur is surely proper. That they must experience gales and heavy seas at that season, in that voyage, was so nearly certain, that it was not unreasonable to act on the assumption that they would occur, and prepare the ship to encounter them while in a smooth sea, when alone they could do so." In *Bentley v. Bustard*, 16 B. Mon. 643, it was held that if a vessel runs on a known obstruction, or upon the shore, without being driven on by the violence of the wind or the force of the current, and the running on could have been prevented by proper care and skill, a jettison will not be justified, although, the vessel being on, it is the only way of getting her off; but the owners of the vessel are liable for the value of the goods thus thrown overboard.

<sup>2</sup> See authorities cited in *Emerigon*, ch. 12, § 40 (*Meredith's ed.* pp. 469, 470),



has passed away, and the practice is almost if not quite unknown.<sup>1</sup> One reason may have been that in those ages the seamen and their officers were more nearly on an equal footing in character and interest than they now are.

Through the whole law of shipping there runs in these days an acknowledgment that the master of a ship must possess peremptory authority. The statutes of the United States protect the safety of the crew against the peril of unseaworthiness by providing that, on the complaint of the mate and the majority of seamen, the condition of the vessel may be ascertained by a regular survey.<sup>2</sup> Nowhere else do they provide for, or suggest, a joint action of the crew and the officers of the ship, and this seldom occurs in fact in any case; and it has been distinctly adjudged, by a court of high authority in matters of shipping, that it is the duty of the master

and in *The Nimrod*, Ware, 9. In the case of *The Nimrod*, Ware, J., says: "Undoubtedly the master, before proceeding to throw overboard any part of his cargo, is bound in common prudence, if the case is such as will admit of deliberation, to consult with the most skilful and experienced men of the ship's company, and to allow to their advice all the consideration it merits. But the law gives him the authority and imposes on him the obligation for the government of the ship. It presumes that his judgment is superior to that of others of the ship's company, and when he consults them, their opinions are, in the language of Emerigon, rather to be weighed than counted. The advice of his crew alone would not, I apprehend, excuse him for a sacrifice which was clearly uncalled for by the danger; nor would it, if he acted against it, render him responsible for a sacrifice which was manifestly required for the common safety."

<sup>1</sup> Ch. Kent says: "Consultation is not indispensable previous to the sacrifice. A case of imminent danger will not permit it. But it must appear that the act occasioning the loss was the effect of judgment and will; and there may be a choice of perils when there is no possibility of safety." 3 Kent, Com. 233.

The rule of consulting the crew upon the expediency of making a sacrifice is rather founded in prudence, in order to avoid dispute, than in necessity; it may often happen that the danger is too urgent to admit of any such deliberation. *Birkley v. Presgrave*, 1 East, 220, 228. Says Chief Justice Tilghman: "It has been said that there must be a previous consultation, but this may be doubted. Consultation, indeed, is demonstrative proof that the act was voluntary. But I should think that if it sufficiently appears that the act occasioning the loss was the effect of judgment, it is sufficient. For in time of imminent danger immediate action may be necessary, and consultation may be destruction." *Sims v. Gurney*, 4 Binn. 513, 524. See also *Col. Ins. Co. v. Ashby*, 13 Pet. 331, 343; *Nimick v. Holmes*, 25 Penn. State, 366, 372.

<sup>2</sup> Act of July 20, 1790, ch. 56, § 3, 1 U. S. Stats. at Large, 132; Act of July 20, 1840, ch. 48, §§ 12, 13, 14, 5 U. S. Stats. at Large, 396.

alone to determine when it is necessary to sacrifice a portion of the cargo for the safety of the residue.<sup>1</sup> It has been said that, where a consultation was had with the crew, the only effect of this as matter of evidence was, that the jettison was made deliberately, but not that it was necessary.<sup>2</sup>

Cases turning upon the question of necessity are rare, for there is usually a strong disposition on the part of the master to preserve the property under his charge. Some question has arisen on the degree of the necessity which would authorize a master to make a jettison. It came before the Supreme Court of the United States, and the decision given by Mr. Justice Curtis states the rule with a precision and accuracy which would seem to leave no doubt.<sup>3</sup> The master must have a large discretion in the matter; and if it were clear that he intended to do his duty, this fact would go far in justifying his actions.

At the same time it must be remembered, that where a jettison is justified by the circumstances under which it takes place, and these circumstances were caused by the fault of the master, or his want of care or skill, the jettison would give no claim for contribution; but the owners of the ship would be liable to the owners of the goods jettisoned for the damages caused by the wrong-doing of their master.<sup>4</sup>

So too it has been held, that if the unseaworthiness of the vessel at the time of sailing caused, or materially contributed to cause, a necessity for the jettison, the loss is not a general average loss.<sup>5</sup> The ship undertakes to carry and deliver the goods safely, with only the exception of the perils of the sea. Unseaworthiness is not a peril of the sea, and for the damage caused by it the ship is responsible to the shipper.<sup>6</sup>

<sup>1</sup> The *Nimrod*, Ware, 9, 15.

<sup>2</sup> *Bentley v. Bustard*, 16 B. Mon. 643, 695.

<sup>3</sup> *Lawrence v. Minturn*, 17 How. 100, 110, *supra*, p. 409, n. 1.

<sup>4</sup> For instance, we have already seen, that if the master carries goods on deck without the consent of the shipper, and it becomes necessary, from stress of weather or the dangers of the seas, to sacrifice the deck-load for the common safety, this does not present a case for contribution, but the master is personally responsible for the loss, and, through him, the ship, it having been occasioned by his own fault. The *Paragon*, Ware, 326, 335.

<sup>5</sup> *Dupont de Nemours v. Vance*, 19 How. 162, 166. See also *Lawrence v. Minturn*, 17 How. 100, 110; *Chamberlain v. Reed*, 13 Me. 357.

<sup>6</sup> *Reed v. Dick*, 8 Watts, 479; *Elliott v. Rossell*, 10 Johns. 1; *Whitall v. Brig William Henry*, 4 La. 223; *Emery v. Hersey*, 4 Greenl. 407.

The sacrifice must be necessary, and the necessity must be a pecuniary necessity ; for property can be called on to contribute only for that loss which was intentionally incurred for the purpose of saving that property. A very peculiar case of much interest has been recently decided in Massachusetts, which strongly confirms the doctrine that a sacrifice of property is not a subject of general average, and cannot found a claim for contribution, unless it is made for the purpose of saving the vessel, cargo, and freight from a peril impending over them. Stronger moral grounds for the sacrifice, we may say a stronger moral necessity, cannot exist than in this case ; but it was deemed wholly insufficient. The bark *Fredonia* encountered on the high seas an emigrant ship, full of passengers, and almost in the act of foundering. The bark had a full cargo of fruit. The passengers whom it could rescue were about three hundred in number. It could not take them on board and bring them into port, with safety to them or to the bark and its crew, without making some room for them in the hold of the bark, by throwing over a part of the cargo. This was done ; and the question was raised, Was the owner entitled to contribution for his cargo thrown over ? The Superior Court decided for the plaintiff. Exceptions were taken and carried to the Supreme Court, when judgment was ordered for the defendants. The rescript is as follows : " The facts show that the immediate motive and cause of the jettison were not to preserve or restore the navigability of the vessel insured, but to make room for and

In *Putnam v. Wood*, 3 Mass. 485, *Parker, J.*, says : " It is the duty of the owner of a ship, when he charters her or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety ; and he is to keep her in that condition, unless prevented by perils of the sea or unavoidable accident. If the goods are lost by reason of any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter, upon the principle that he tacitly contracts that his vessel shall be fit for the use for which he thus employs her."

If a vessel founders, the carrier must prove that she was seaworthy, before he can bring himself within the excuse of its being the act of God ; but she need only be seaworthy for the trade in which she is employed. That which would constitute seaworthiness for a short voyage upon the lakes may not be seaworthiness for a voyage upon the ocean. But if the facts of the loss are such that it may fairly be attributed to inevitable accident, and the owner of the goods means to allege that the vessel was not seaworthy at her departure, the burden of proof is upon him, and not on the carrier. *Bell v. Reed*, 4 Binn. 127.

receive on board the passengers and crew of another vessel, which was in imminent danger of foundering at sea with all on board. The jettison cannot therefore be deemed to have been a sacrifice of a part of the cargo for the purpose of obtaining safety from a peril impending over the vessel insured, and the cargo and freight. There was not a general average loss entitling the owner of cargo to contribution."<sup>1</sup>

## SECTION XI.

### WHERE THE PROPERTY SACRIFICED WOULD HAVE BEEN INEVITABLY LOST.

A principle has been presented on this subject by a text-writer of high authority, which, however, has but little support from the decided cases. Benecke says: "If the master's situation were such that, but for a voluntary destruction of a part of the vessel, or her furniture, the whole would certainly and unavoidably have been lost, he could not claim a restitution, because a thing cannot be said to have been sacrificed which had already ceased to be of any value."<sup>2</sup> We cannot think that this opinion of Benecke rests upon any good reason; and if applied in the terms in which he expresses it, it would exclude nearly all the cases which are regarded both in law and in practice as general average losses. Indeed, those cases may be generally described as cases in which ship and cargo are exposed to a common peril by which the whole would be certainly and unavoidably lost, unless a part be sacrificed to save the rest; and, the sacrifice being made, the residue or a part of it is saved.

One of his reasons seems to be, that, if the thing sacrificed be contributed for, this contribution must be measured by its value at the time the sacrifice was made, and where it would be inevitably lost by the peril if not voluntarily lost, its value must therefore be at that time nothing. But this view rests upon an obvious fallacy. All parts of the property will be inevitably lost unless some part is sacrificed. By this sacrifice the residue may be saved. And as

<sup>1</sup> *Dabney v. New England Ins. Co.* 14 Allen, 300.

<sup>2</sup> *Stevens & Benecke on Average* (Phil. ed.), 110.

each part has the chance of being saved by the sacrifice of some other part, each part then has a value; and if the sacrifice be made, whatever is saved contributes, and its contributory value is its value when saved.

It may be true that, if the thing which is purposely destroyed could not itself by any means whatever be saved, then it may be said that there is no voluntary sacrifice at all, for only that destruction was hastened which could not have been prevented. Such a principle may account for the case where a vessel laden with lime was hauled out into the stream and there scuttled, because the lime was on fire.<sup>1</sup> When the water poured into the vessel, the lime was destroyed at once. The ship was saved, but did not contribute for the loss of the lime, because the lime could not possibly have been preserved, and the ship was saved by only hastening its destruction.

<sup>1</sup> *Crockett v. Dodge*, 3 Fairf. 190. This case proceeds entirely on the ground that the lime, at the time the vessel was scuttled, was worthless, and therefore does not differ from the principle before laid down, that goods are to be contributed for only at the value they had at the time of the sacrifice. See also *Nickerson v. Tyson*, 8 Mass. 467. See, however, the remarks of Mr. Justice Story, in *Col. Ins. Co. v. Ashby*, 13 Pet. 331, 340. In *Marshall v. Garner*, 6 Barb. 394, a claim was made for contribution for masts, which had been cut away. At the time they were sacrificed, the ship was on a beach in four feet of water, while she drew fifteen. She was on her broadside, where she lay on her bilge. If the masts had not been cut away, the ship and cargo would have been lost, and all on board would have perished. As soon as the masts were cut away, the vessel righted, and the cargo was saved. It was held that there could be no contribution, because, at the time the masts were cut, their destruction from already existing causes was only anticipated, and that nothing, therefore, was sacrificed. This question was discussed at great length in the recent case of *Lee v. Grinnell*, 5 Duer, 400, *supra*, p. 347, n. 3. The rigging and upper spars of the vessel, which was lying at a wharf, were on fire. The firemen refused to work on board or near the ship for fear of the blocks, and other articles, which were on fire aloft, falling on them. For the purpose of saving the ship and cargo, the masts were cut away. Assuming that the purpose was accomplished, the court were divided on the question whether the masts were to be contributed for, Mr. Justice Duer holding that they were not, Mr. Justice Hoffman being of a contrary opinion, and Mr. Justice Campbell declining to express his views upon the subject.

But where a cargo is on fire from an accidental cause, and the vessel is scuttled, or water is poured down to extinguish the fire, and goods are thereby injured which the fire had not reached, they are to be contributed for. *Nelson v. Belmont*, 5 Duer, 310, 323; *Lee v. Grinnell*, 5 Duer, 400. See also *Slater v. Hayward R. Co.* 26 Conn. 128, *supra*, p. 347, n. 3.

This rule cannot, however, apply to cases in which a vessel must be somehow lightened, and only those goods which lie directly under the hatches can be thrown over, because at the time they can only be reached. It might be said that these goods could not possibly be saved in any way ; and if not jettisoned, they, with the ship and the rest of the cargo, would have been lost. Nevertheless, this would certainly be a general average loss.

## SECTION XII.

### ADJUSTMENT OF GENERAL AVERAGE.

The process of determining what amount shall be paid by way of contribution, of assessing this upon the interests which are required to contribute, and of apportioning it among the interests which receive contribution, is called the adjustment of average losses.

The principles involved in this subject are, to a large extent, equally involved in the previously considered topic of general average. But the subject of the adjustment of losses may usefully be considered by itself. We say, of losses ; for it is very seldom that a ship reaches a port, under circumstances which call for an adjustment of average, without the question arising, as to some of the losses, whether they are general average losses, to be divided accordingly, or partial losses, to be cast upon one owner alone.

This subject of adjustment may be considered under the following heads : What losses are adjusted as general average losses. What things contribute. How the value of the receiving interests and of the contributory interests is estimated. When and where and by whom the adjustment should be made. The force and effect of the adjustment.

## SECTION XIII.

### WHAT LOSSES ARE ADJUSTED AS GENERAL AVERAGE LOSSES.

Of the maritime interests, ship, cargo, freight, and profits, we have seen that any one may be sacrificed to save the rest, and any

one may be saved by the sacrifice of some other. Any one of them may therefore be entitled to receive contribution, or may be called upon to make contribution. There are some principles of general average contribution which may be applied to every kind of loss. One of them requires that all of those who are interested in the property, to save which other property was sacrificed, shall suffer by the loss, respectively, only in proportion to the extent of their several interests.

The property which was sacrificed for the general benefit is, when the adjustment is made, considered as if it still constituted a part of the whole property upon which the contribution is assessed, and its value is fixed in accordance with the value of the property saved.<sup>1</sup> We have seen, that, if it were not so, the owner of the property sacrificed would receive its whole value, and would not then be in the same condition in which he would have been had his property been saved by the sacrifice of the property of some other party. And it is the fundamental law of general average, that all interested should suffer equally. Hence, where a sacrifice of property has been made to save the rest and nothing is saved, there is nothing to contribute, and nothing to be contributed for.<sup>2</sup>

It is important here to distinguish between sacrifices which are properly, as well as formally, general average losses, and on the other hand, expenses incurred for a common benefit, and reimbursed by an apportionment after the manner of general average. We say this distinction is important, although in some cases it may be difficult to apply it. But the rule or principle must certainly be this: wherever the loss is properly one of general average, nothing contributes for it that is not saved; but expenses may be incurred, on justifiable grounds, in such a way as to create a personal debt from all those for whose benefit they were incurred. This debt must be paid with no reference to the result of these expenses, and, in apportioning it among the various parties for whom it is incurred, the principles of general average will usually be applicable.<sup>3</sup>

<sup>1</sup> 3 Kent, Com. 242; Benecke, Pr. of Indem. 286.

<sup>2</sup> 2 Arnould, Ins. 926; Emerigon, ch. 12, § 41, vol. 1, p. 601 (ed. 1827); Benecke, Pr. of Indem. 289.

<sup>3</sup> Benecke, Pr. of Indem. 251; Spafford v. Dodge, 14 Mass. 66; 2 Arnould Ins. 921; 2 Phillips, Ins. § 1819.

Among the cases which have arisen in which this distinction becomes important, and at the same time very difficult, is that which occurs when goods are sold by the master in a foreign port to raise necessary funds; and the question is, whether these expenses are to be treated as sacrifices constituting general average loss. Where these expenses accomplish their purpose,—as, for example, if money be raised for repairs, and the vessel, being repaired, goes on her way, carrying her cargo to its destination, or where money is raised by way of ransom to procure the recovery of a captured ship, and the ship is delivered up and completes her voyage,—these expenses are always adjusted as general average charges.<sup>1</sup>

But suppose these expenses to be entirely ineffectual, and the whole adventure perishes; the question then arises, Are they to be repaid? Neither in England nor in this country can the law on this subject be regarded as settled.

On the Continent of Europe it would seem to be at least the prevailing rule that the ship-owner shall reimburse the owner of the goods sold, whether any part of the adventure be finally saved or not.<sup>2</sup> And the reason for this is, that it is the duty of the master and owners of the ship under such circumstances so to raise and expend their funds, and that, when they so used the goods of the shipper as to enable them to discharge this duty, they contracted an individual debt in favor of the shipper;<sup>3</sup> and there is one English case in which this rule seems to be adopted.<sup>4</sup>

<sup>1</sup> *Plummer v. Wildman*, 3 M. & S. 482; *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Spafford v. Dodge*, 14 Mass. 66; *Douglas v. Moody*, 9 Mass. 548; 1 *Magens*, 64; *Welles v. Gray*, 10 Mass. 42.

<sup>2</sup> 2 *Arnould*, Ins. 924; *Pothier*, Contrats Maritimes, Nos. 43, 72; *Code de Commerce*, art. 298; *Laws of Wisbuy*, art. 68. Although this last-named article is cited by *Emerigon* and by *Valin*, its genuineness is doubted by *Benecke*, who says that this regulation is not found in all the editions of those laws, and that the fortieth article, on the contrary, provides that the master who, in cases of necessity, sells goods abroad, shall pay for the same upon his arrival at the place of discharge, at the market price, and receive his freight in full. *Benecke*, Fr. of Indem. 266.

<sup>3</sup> “Il a paru équitable de penser, que le capitaine et les propriétaires du navire, qui etaient chargés de pourvoir à ses besoins, avaient contracté une dette individuelle, en appliquant ces marchandises à l’accomplissement de leur devoir personnel.” *Boulay Paty*, Cours de Droit, Com. Mar. tit. 8, § 9, vol. 2, p. 420 (ed. 1821).

<sup>4</sup> *Powell v. Gudgeon*, 5 M. & S. 431. In this case a ship, being disabled by the



On the other hand, it is held by some authorities, that goods sold abroad for a common necessity should be regarded as sacrificed for the common benefit, or, in other words, should be treated as if jettisoned; for it is the same thing to the merchant whether the goods be sold, taken, or thrown into the sea.<sup>1</sup> And then again, as goods if jettisoned are considered as still continuing on board, and the goods sold are to be treated as if jettisoned, they also must be considered as still continuing on board;<sup>2</sup> and therefore, if the whole adventure subsequently perishes, these goods perish with the rest, and no contribution is due for them. Emerigon, Stevens, Benecke, and Kent may be cited as holding these views.<sup>3</sup>

Mr. Arnould considers that these conflicting authorities do not differ so widely as they appear to, and that they may be reconciled to each other, by considering that the rule that the ship-owner is liable for goods so sold, although his ship be not saved by them, is applied only to the cost of the necessary repairs which he was himself bound to make at his own expense; while the authorities who consider him discharged by the loss of the ship have in their mind only those extraordinary expenses which are incurred for the common benefit, and give a claim to general average contribution.<sup>4</sup>

perils of the sea from pursuing her voyage, was obliged to put into port to repair; and, in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses. The action was brought by the owner of the goods sold upon a policy of insurance upon the same; and it was held that the underwriter was not answerable for the loss, it not being occasioned by a peril of the sea. Mr. Justice Bailey, after expressing his concurrence with the opinion of Lord Ellenborough, C. J., said: "It does not appear to me that this was a loss by a peril of the sea, or such as entitles the assured to recover, under the general words of the policy; but a loss for which the owners of the goods will be entitled to be reimbursed by the owner of the ship. The owner of the ship undertakes to have the ship fit to perform her voyage; and, in case of accident, it is the duty of the owner, and the master in place of the owner, to provide for its repair. The loss here was occasioned by the act of the captain, who disposed of the goods in order to provide himself with funds for the repair of the ship. If he could have raised these funds in any other way, he would not have taken the goods."

<sup>1</sup> Stevens on Av. (5th ed.) 15.

<sup>2</sup> "Les effets jetés, vendus, ou donnés pour le salut commun, sont présumés être encore existans dans le navire." Emerigon, tome 1, ch. 12, § 43, p. 654.

<sup>3</sup> Emerigon, *supra*; Stevens, *supra*; Benecke, Pr. of Indem. 292; 3 Kent, Com. 242.

<sup>4</sup> 2 Arnould, Ins. 925.

We cannot think that very much is gained by this distinction; in fact, it leaves the question substantially unanswered; for the precise difficulty in determining such a case is to decide whether the expenses were such as the master was bound to make at his own charge, for the benefit of others, or whether they were expenses which he voluntarily incurred for a common benefit, and on which, therefore, he may found a claim for general average contribution. But, upon the whole, we can only say that the conclusion of the authorities above referred to, who consider the ship discharged by the loss of the adventure, would be that adopted generally, to say the least, in practice in this country.

There is another question which stands in some relation to that we have just considered, in regard to which there is much conflict of opinion, and perhaps some uncertainty. It is this: If a sacrifice be made for the common benefit and to avert the peril that threatens all, and the ship perishes by that very peril, while the cargo or a part of it is saved from the wreck, does that which is saved contribute for that which is sacrificed? The civil law declares that no contribution should be made in such a case, but that the merchants save all they can on their own account, as if from a fire.<sup>1</sup> The French law follows the rule of the civil law and provides that, "if the jettison does not save the ship, no contribution takes place."<sup>2</sup> And all the French writers upon insurance are unanimous in the same view,<sup>3</sup> and the same thing is asserted by English text-writers,<sup>4</sup> and by Chancellor

<sup>1</sup> Dig. l. 14, tit. 2, f. 7. "Cum depressa navis aut dejecta esset, quod quisque ex ea suum servasset, sibi servare respondit, tanquam ex incendio." Pardessus, Coll. de Lois Mar. vol. 1, ch. 3, p. 108.

<sup>2</sup> Code de Commerce, art. 423; Ord. de la Marine, tit. du Jet. art. 15.

<sup>3</sup> Emerigon, vol. 1, ch. 12, § 41, p. 616; Boulay Paty, Traité des Ass. ch. 12, § 41, p. 601; Pothier, Cont. Mar. No. 114; Valin, tit. du Jet. et de la Contribution, art. 15, 19, vol. 2, pp. 205, 209.

<sup>4</sup> 2 Magens, 97; Stevens on Av. (5th ed.) 8; Marshall on Ins. Bk. 1, ch. 13, § 7, p. 463. Marshall says that if, on the contrary, the ship is preserved by the jettison, and continues her course, but is afterwards lost, the effects saved from this last misfortune, if any, shall contribute to the loss sustained by the jettison, because to that the preservation was once owing. Magens speaks to the same effect, vol. 2. pp. 98, 240. Valin says, however, citing Domat, fol. 187, that where the ship perishes during the same storm on account of which the jettison was made, even though it may not be till some days afterwards, yet the goods saved do not contribute for those sacrificed. Tit. du Jet. art. 16, p. 207, vol. 2.

Kent,<sup>1</sup> who cites in favor of this view two American cases.<sup>2</sup> On the other hand, Benecke and Phillips<sup>3</sup> are of a different opinion.

The question, while seemingly one of law, may be regarded as, to some extent, rather one of fact, — Was any property saved by the jettison? The strong expression above quoted from the French Code de Commerce goes on the supposition that the jettison was made to prevent the wreck, and, if the wreck then took place, the jettison was wholly ineffectual; and, as it did no good, it could find no claim to contribution. And it must be admitted that the most general foundation of an average claim is the principle of justice, that whoever is benefited by the voluntary sacrifice of another's property, which sacrifice was made to benefit him, ought to compensate therefor. Consequently, if no one is benefited by the sacrifice, no one should be called upon to contribute for it.

But is this the only principle of justice in the case? The Spanish law,<sup>4</sup> Weijtsen,<sup>5</sup> whom Mr. Arnould justly calls "an early

Chancellor Kent, with Marshall, says that a temporary safety is all that is requisite to entitle the owners of the property sacrificed to contribution; and he cites Vinnius, in *Peckium ad legem Rhodiam*, 246, 250, and Boulay Paty, tome 4, 443. 3 Kent, Com. 240. See also *Scudder v. Bradford*, 14 Pick. 13, 14.

<sup>1</sup> 3 Kent, Com. 234.

<sup>2</sup> *Crockett v. Dodge*, 3 Fairf. 190; *Williams v. Suffolk Ins. Co.* 3 Sumner, 510.

<sup>3</sup> Benecke, *Pr. of Indem.* 179. He cites a case from Emerigon, vol. 1, p. 616, where a French vessel, in order to escape from an English privateer, threw overboard her guns, part of her apparel, and one hundred barrels of rice. She nevertheless was taken, but six days afterwards made her escape. It was decided that no contribution could take place, as the ship was not saved by the jettison. Benecke, commenting upon the case, says: "The unreasonableness of this decision is apparent, if the case is considered according to its nature, and not according to positive laws. Every party interested would, at the moment of danger, had he been present, have willingly consented to pay for the goods which must be sacrificed to give the vessel a chance to escape, even if the attempt should fail, and the vessel with her remaining cargo be saved in some other way. The attempt to save was in itself of value to all parties, consequently all parties ought to concur in the loss. Those goods, if not thrown overboard, would have been saved like the rest out of the enemy's hands, and their owner would have been in the same situation as the rest of the parties. Consequently he ought to be placed in the same situation by a general contribution, if, after an unsuccessful attempt to save the whole by jettison, it be afterwards saved by any other means." He cites Weijtsen, § 33, to the same effect. See also 2 Phillips on Ins. 98.

<sup>4</sup> Ord. de Bilbao, cap. 20, art. 16.

<sup>5</sup> Weijtsen, *Traité des Avaries*, art. 33.

and highly esteemed writer upon average," Mr. Benecke,<sup>1</sup> and Mr. Phillips<sup>2</sup> hold that the law should be adjusted on the ground, that the goods saved should contribute for those sacrificed, because, if the goods jettisoned had not been destroyed, their owners might have saved or recovered them in the same way as the other owners have saved or recovered theirs.

The principle involved in this is one which was somewhat considered in the preceding chapter. It is, that if property be voluntarily sacrificed to avert a common peril, and the property for whose benefit the sacrifice is made is saved, although not thereby, and the property sacrificed might have been saved as well if not so destroyed, then this sacrifice should still be compensated for.

The obligation does not now rest upon the success of the sacrifice, but on the motive, and on the implied contract of those whose property is saved to compensate those whose property is destroyed that theirs may be saved. If all is lost, there is no claim for compensation, because nothing in fact is sacrificed; for that which is voluntarily destroyed would have been lost with the rest. But if the rest or a part of it is saved, and that which was voluntarily destroyed might have been saved as well, the adjustment rests on the supposition that an implied promise of compensation comes in. We think there are American cases which sustain this conclusion.<sup>3</sup>

<sup>1</sup> Benecke, *Pr. of Indem.* 178 - 181.

<sup>2</sup> 2 *Phil. on Ins.* § 1318.

<sup>3</sup> In *Walker v. United States Ins. Co.* 11 S. & R. 61, it was decided that if a vessel lying at anchor be in danger of being driven ashore in a dangerous place by a storm, and the captain, in order to avoid the danger, cuts the cables and hoists sail for the purpose of getting out to sea, or, if that be impracticable, of going ashore elsewhere, but the vessel nevertheless goes ashore and bilges, the cargo saved should contribute for the loss of the cables and anchors, as well as for any other sacrifice of the rigging or hull, which can be shown to have been made for the common benefit. Here the purpose of the sacrifice was not accomplished, — the ship was not prevented from going ashore; and yet contribution for the loss was allowed, the court holding that it was the deliberate purpose to sacrifice the thing at all events, combined with a view to the general welfare, which was the distinguishing feature between general and particular average, thus showing that the claim to contribution depended upon the motive rather than upon the success of the sacrifice. Where a ship was accidentally stranded, and, after an unsuccessful jettison of a large quantity of sugar for the purpose of getting her off, was abandoned by the master and crew, and the ship afterwards floated and was picked

## SECTION XIV.

## WHEN THE LOSS OF THE SHIP IS TO BE ADJUSTED AS A GENERAL AVERAGE LOSS.

It is very seldom that the whole ship is to be contributed for as sacrificed for a common benefit, and therefore a general average loss. It occurs only in a case of voluntary stranding, and this subject has been already fully considered.

But a partial injury to the ship voluntarily caused for the common benefit frequently occurs, and then it is to be distributed by the adjustment among the interests benefited.<sup>1</sup> In applying this rule, we must remember that here, as elsewhere in the maritime law, the word "ship" includes whatever is on board the ship for the objects of the voyage and adventure in which she is engaged, and belongs to the owners, and is either a part of the ship or one of her appurtenances, that is, distinctly connected with the ship and the proper use of her. The question whether a thing sacrificed is a part of the ship is of less importance in respect to the law of general average, because, if anything belonging to the owners is sacrificed for the common benefit, it must be contributed for.

Masts, spars, guns, anchors, cables, ship's stores, when purposely lost for the common benefit, are adjusted on the same footing with jettisoned goods. A difficulty in this case sometimes arises, when it is necessary to distinguish between a voluntary sacrifice and a loss by the mere perils of navigation, or even by wear and tear; as, for example, if cables are cut away or anchors are slipped to avoid being separated from convoy, this is a general

up and brought into port, Mr. Justice *Story* said: "In respect to the jettison of the cargo, it is clear that it constitutes a case of general average, to be borne by the ship, freight, and cargo, *ultimately saved*." The *Nathaniel Hooper*, 3 Sumner, 542. Here the object of the jettison was to lighten the ship that it might be got off,—an object which the sacrifice clearly failed to accomplish; and yet it was held that the property ultimately saved, though saved by other means, should contribute to this unavailing loss, the intention of the loss being the common benefit of that property. But see, to the contrary, *Scudder v. Bradford*, 14 Pick. 13.

<sup>1</sup> *Benecke*, Pr. of Indem. 230; *Bradhurst v. Col. Ins. Co.* 9 Johns. 9; *Gray v. Waln*, 2 S. & R. 229; *Caze v. Reilly*, 3 Wash. C. C. 298; *Walker v. U. S. Ins. Co.* 11 S. & R. 61; *Emerigon*, vol. 1, ch. 12, § 41, p. 620.

average loss on the Continent of Europe,<sup>1</sup> but not in England.<sup>2</sup> This question has not arisen in this country.

Here as elsewhere property lost is adjusted as general average, when it is not intentionally destroyed or lost, but is voluntarily exposed to an extreme peril which causes its destruction.<sup>3</sup>

If sails are set in a violent tempest to draw the vessel away from a lee shore, or to escape capture when they would not be exposed to such a wind under ordinary circumstances, and are blown away by the tempest, it may not be certain whether this should be adjusted as a general average loss.<sup>4</sup> It must depend upon the circumstances of the case. It is quite a different question from that which occurs when cables are cut, or anchors abandoned, for the purpose of putting to sea to escape from a lee

<sup>1</sup> Emerigon, vol. 1, ch. 12, § 41, p. 621; Casaregis, Disc. 46, n. 9, *et seq.*

<sup>2</sup> Stevens on Average, (5th ed.) 14; Park on Ins. (8th ed.) 284.

<sup>3</sup> Sturgess v. Cary, 2 Curtis, C. C. 68; Barnard v. Adams, 10 How. 304.

<sup>4</sup> Where a ship was captured by a privateer, but on account of a heavy gale and the sea running high the privateer could not take possession of her, and in order to escape the ship carried an unusual press of sail, in consequence of which she was much strained, opened most of her seams, and carried away the head of her mainmast, but finally succeeded in getting away, it was held that these damages were only a common sea risk, and were not a subject for general average. Covington v. Roberts, 5 B. & P. 378. The court said: "This is only a common sea risk. If the weather had been better, or the ship stronger, nothing might have happened." See also a *dictum* by Gibbs, C. J., in Taylor v. Curtis, 4 Camp. 338. Where similar damages were incurred by a ship's being obliged to carry a press of sail to avoid the dangers of a lee shore, the same decision was made, the court remarking, after commenting upon the Continental law upon the subject, that "with us, all casual and inevitable damage and loss, as distinguished from that which is *purposely incurred*, is a subject of particular, not general average. Shiff v. La. State Ins. Co. 18 Mart. La. 629. See also Power v. Whitmore, 4 M. & S. 141. But upon the Continent of Europe the law seems to be established that such an injury would give the ship-owner a claim for contribution. Valin, Ord. de la Mar. Tit. du Jet. art. 1, p. 189; Boulay Paty, Cours de Droit Com. Mar. tit. 12, § 2, p. 446; Prussian Ord. § 1824; Emerigon, ch. 12, § 41, p. 622. Emerigon says: "Le dommage arrivé aux voiles forcées pour le salut commun, étoient avaries grosses; car, forcer les mats, ou les voiles, c'est la même chose." Benecke says, however, Pr. of Indem. p. 190, that he has seen several French statements of general average of a later date than the Code de Commerce, in which the damage sustained by crowding sail was not admitted as a subject for contribution. The damage which the goods sustain, in consequence of a vessel's crowding sail, is nowhere allowed in general average; nor could any good reason be assigned for making such allowance.

shore in a storm. Here it seems to be agreed that this is generally, if not always, to be adjusted as a general average loss.<sup>1</sup> It is true that cables are not intended to be cut, nor anchors abandoned; whereas it is intended that sails should be exposed to the wind. Still, we believe that, in practice, their loss would be adjusted as a general average loss, if they were lost because exposed to an extraordinary peril and from an extraordinary necessity.

So we should say that the loss of an anchor, by the chafing of the cable or the impossibility of weighing the anchor, should be so adjusted when the anchor was dropped in an unusual place to escape some extreme peril.<sup>2</sup> Mr. Arnould admits that in practice this is frequently adjusted as a general average loss, but adds that, "on principle, as the damage thus incurred was not intended or anticipated as the result of the act, as it was directly caused, not by the agency and will of man, but by the force of the elements, it ought not to be considered a general average loss."<sup>3</sup> But it is well settled, in practice as well as in law, that if goods are put into boats to lighten a wrecked vessel, and are lost by the violence of the winds and waves, on their way to the shore, this is adjusted as a general average loss, although it was not intended or anticipated as a result of the act, and was directly caused, not by the agency and will of man, but by the force of the elements.<sup>4</sup>

It is hardly necessary to say, that where spars or sails are carried overboard by the wind, or cables cut, or anchors lost, in the common course of navigation, it is adjusted as a partial loss, and not as one of general average.<sup>5</sup> Mr. Arnould states this, and

<sup>1</sup> *Greeley v. Tremont Ins. Co.* 9 Cush. 419; *Hennen v. Monroe*, 16 Mart. La. 449; *Magens*, Case 27, pp. 323, 330; 2 Valin, *Ord. de la Mar. tit. des Avaries*, art. 6, p. 165; 1 *Emerigon*, 621; *Bradhurst v. Col. Ins. Co.* 9 Johns. 9.

<sup>2</sup> *Benecke*, *Pr. of Indem.* p. 191; *Weskett*, *tit. Gen. Av. n. 3*; *Weijtsen*, § 11; *Magens*, 53.

<sup>3</sup> 2 Arnould on *Ins.* 894.

<sup>4</sup> *Lewis v. Williams*, 1 Hall, 430, 437; *Code de Com. l. 2, tit. 11, n. 238*; 2 Valin, *Ord. de la Mar. tit. 8, art. 19*, p. 209; 1 *Emerigon*, 613; *Stevens on Av.* p. 15; *Benecke*, *Pr. of Indem.* 209; *Abbott on Shipping*, 477. Upon the same principle, goods taken out of a ship and placed upon the beach, to lighten her when stranded, if damaged, are a subject for general average. *Hennen v. Monroe*, 16 Mart. La. 449.

<sup>5</sup> *Dig. 14, 2, 2*; *Moses v. Sun Ins. Co.* 1 Duer, 159, 170. When sails are let go for the purpose of righting the vessel when on her beam-ends, they are subjects of general average. So at least says *Benecke*, *Pr. of Indem.* 185. But it would not be easy to distinguish this from the ordinary duties and perils of navigation.

adds that if these losses occur "in order to prevent her drifting on a lee shore, or to avoid capture, it is general average; the reason being that in the last case there is, and in the first there is not, an immediately impending danger to justify the sacrifice."<sup>1</sup> But the presence of the danger is not enough, we think, to found the distinction; there must be not only an immediately impending danger, but a danger sufficiently extraordinary to take the case out of the common course and perils of navigation.

It is quite well settled that if any part of the ship or her appurtenances be applied for the common benefit, from necessity, to some temporary purpose, entirely different from its ordinary use, this application being such as prevents the thing so used from being restored to its ordinary use, or injures it materially, this is to adjusted as a general average loss.<sup>2</sup> It is on this principle that it

<sup>1</sup> 2 Arnould on Ins. 895.

<sup>2</sup> *Birkley v. Presgrave*, 1 East, 220. In this case, the ship *Argo*, as she was entering Sunderland Harbor, was by a sudden squall prevented from proceeding farther, and the small bower anchor was let go in order to bring her up. In order that the anchor might hold, and for the preservation of the ship and cargo, more cable was payed out, and the ship was permitted to drive alongside the pier, to which she was made fast with hawser ends and towing-lines, such as were usually employed for that purpose. The master cut the cable from the best bower anchor, that was then upon the ship's bow, fearing that another ship would be adrift and come down upon the *Argo*, and that in that case there would not be time enough to undo the cable; and with this he fastened the ship to the pier. While they were so fastening her, the hawser and towing-lines, from the force of the storm and by another ship's driving against the *Argo*, broke; and if there had been another minute's delay in cutting the cable, the ship would have gone adrift and sunk upon the bar at the entrance of the harbor; and this she avoided by the cutting and using of the cable in the manner aforesaid. In an action brought by the ship-owners for contribution, they admitted that the loss of the hawser ends and towing-lines did not fall within the meaning of general average, being only applied to the ordinary purposes for which they were provided; but they claimed that the cable, being appropriated to a different use from that for which it was originally intended, and for the preservation of ship and cargo, constituted a charge of general average; and the court so held, Lord *Kenyon*, C. J., saying that, "with respect to the other question, all ordinary losses and damage sustained by the ship happening immediately from the storm or perils of the sea must be borne by the ship-owners; but all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably by the defendant as general average." A similar decision was made in *Marsham v. Dutrey*, *Select Cases of Evidence*, 58.



has been decided in England that the damage done to a ship by fighting, the ship being armed for the purpose, was not to be adjusted as a general average loss.<sup>1</sup> Mr. Arnould, in speaking of this case, thinks that the rule should be confined to a ship of war; and fighting ought not, in his judgment, to be regarded as falling within the scope of those ordinary duties of navigation to which the owner is bound by his contract with the freighter.<sup>2</sup> To this we should reply, that the ship was armed for this very purpose, and that the shipper put his goods on board of her knowing that, and perhaps because he knew that she was armed and able to defend herself, and would do so wherever possible. Mr. Stevens agrees on the whole with the conclusion of the court, but states

<sup>1</sup> *Taylor v. Curtis*, 4 Camp. 337, 6 Taunt. 608. The plaintiffs were owners of the ship *Hibernia*, in which the defendant shipped goods to be carried from London to St. Thomas, in the West Indies. In the course of the voyage the ship was attacked by an American privateer. The *Hibernia* resisted, and a severe engagement ensued. The privateer was beaten off, and the *Hibernia* delivered her cargo safely to the consignees. She sustained great damage, during the engagement, in her hull and rigging, which were repaired at a considerable expense to the owners. They also incurred a further expense in providing medical assistance for several of the crew who were wounded in the action. Large quantities of gunpowder and shot were likewise expended upon the occasion, which had formed part of the stores and outfit of the ship. In the trial at *nisi prius*, *Gibbs*, C. J., said: "I cannot feel that this is a loss entitling the plaintiffs to claim a contribution as for general average. The defence may be ungracious; but according to the rules which prevail in this country I think the loss must fall entirely upon the ship. I cannot distinguish this from the case of a ship carrying a press of sail to escape from an enemy. That is done voluntarily for the preservation of all; but it has been held that a loss arising from a hazard so incurred is not the subject of general average. I likewise remember a case where a ship ran away from a privateer, and was shot through, and it was held that the owner could not claim a general average from the damage so sustained. The practice of underwriters sometimes to contribute to a loss such as this cannot weigh much, as it may be accounted for from the honor and liberality of those who contribute, and from the sense they must feel of their own interest. If there is no reward allowed for a gallant resistance, such resistances will not be made, and the whole value of the property must be paid, instead of a gratuity for saving it."

This decision was confirmed upon appeal by the Court of Common Pleas. The court there said: "The measure of resisting the privateer was for the general benefit, but it was a part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them; and there, it seems to me, they ought to rest." 6 Taunt. 623.

<sup>2</sup> 2 Arnould on Ins. 897.

that many well-informed underwriters think that it should be adjusted as a general average loss.<sup>1</sup> We cannot but think that the court were unquestionably right.

We agree with what Chief Justice *Gibbs* said in trying the case at *Nisi Prius*: "I cannot distinguish this from the case of a ship carrying a press of sail to escape from an enemy." It was the duty of the ship to make the utmost use of its sails to escape in that way if it could, but if it could not escape by their help, then to use its guns.

Where the ship is intentionally cut or damaged that fire may be reached and extinguished, it is obvious that it should be adjusted as a general average loss.<sup>2</sup>

## SECTION XV.

### WHEN THE CARGO SHOULD BE CONTRIBUTED FOR.

By far the most common instance of this is jettison of the goods;<sup>3</sup> but, as we have already seen, goods sold in a foreign port under a necessity which justifies their sale and to raise funds for the common benefit should be adjusted, by the weight of authority and by what we believe to be prevailing practice, as a jettison of the goods.<sup>4</sup>

If goods are injured for the common benefit, as by water used if the ship be on fire to extinguish it;<sup>5</sup> or if a hole be cut in the

<sup>1</sup> Stevens on Average (5th ed.) 36.

<sup>2</sup> See *Nelson v. Belmont*, 5 Duer, 310, *infra*, p. 414, n. 1. *Benecke*, Pr. of Indem. 243; *contra*, *Emerigon*, ch. 12, § 17, p. 436.

<sup>3</sup> In *Rogers v. Mechanics' Ins. Co.* 1 Story, 603, blubber was jettisoned. It was contended that it was impossible to determine its value, as the amount of oil which could be made from it was very uncertain; but the court held that if the blubber had any value whatever it was entitled to contribution, and that its value must be ascertained approximately, if it could not be done with absolute certainty. See, in addition to the cases already cited relating to the jettison of goods on deck, *Miller v. Tetherington*, 6 H. & N. 278, affirmed, 7 H. & N. 954.

<sup>4</sup> *The Ship Packet*, 3 Mason, 255, 260; § Kent, Com. 242; *The Gratitude*, 3 Rob. Adm. 263; *Dobson v. Wilson*, 3 Camp. 480, 487; *Giles v. Eagle Ins. Co.* 2 Met. 140, 144; *The Mary*, 1 Sprague, 51.

<sup>5</sup> In *Nimick v. Holmes*, 25 Penn. State, 366, while the steamboat of the plaintiffs was lying at the wharf in Cincinnati, taking in its cargo, it was discovered to be on fire in the hold. It was at first attempted to extinguish the flames by in-

deck to get at the burning ship, and before it can be secured the waves break in and damage the cargo;<sup>1</sup> such an injury would be adjusted as an average loss. It might be a different question if the goods themselves were on fire, and water poured in to extinguish it, and the cargo was saved but in a wet and damaged condition; should the ship now contribute? The peril was a common one, for the cargo could not be permitted to burn without imperilling the ship. But the goods were in the first and immediate peril, and it was primarily to save them that they were wet. It would be an analogous question if the ship alone were on fire. We may suppose lightning had set fire to its topmast and the mast was cut away, and with its sails and rigging lost; would the cargo now be required to contribute? Or a still nicer question might arise if the cargo were on fire and it was owned by many shippers, and that part of it which was damaged by water was owned by other shippers than those who owned the goods actually on fire; and the goods of yet other shippers were saved unharmed. Is all the damage by water a general average loss, and if so, who shall contribute to it? Shall it be the owners of the uninjured cargo,

jecting steam into the hold and pouring in water; but this proving unavailing, and the officers believing there was no other means of saving the boat and cargo, determined, after consultation, to scuttle her. They accordingly ran the boat out into the river about two miles from the wharf, and there sunk her. A portion of the deck was torn up, and water introduced from above, and by these means the fire was subdued. Subsequently the boat was raised and taken back, with the remnant of the cargo, to Cincinnati, where the cargo was sold. The cargo was injured to about seventy-five per cent of its value, and the boat and cargo together to about twenty-five per cent of their entire value. It was held that this damage was a subject for general average. The court said: "Guided by the light of the rule and its instances, we felt constrained to say that when a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of vessel in order to get at it, is general average. The danger is a common one, and the cost of the remedy must be common. It makes no difference how the water is applied, — by the aid of fire-engines on the land, or in the form of steam, or by scuttling the vessel. All these modes were tried in this case before the success was complete. They are all to be treated together, because they all referred to the same peril. They were the means employed for the purpose of averting the danger in which they were placed. It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water, in order to save the rest. The result was successful, if a single article was saved by the means employed."

<sup>1</sup> See *Nelson v. Belmont*, 5 Duer, 310, *infra*.

or the ship-owners also, or all who are interested in ship, cargo, or freight?<sup>1</sup> It may be difficult to draw the line, but we think there is some ground for a distinction between these cases and such a case as where the ship is cut to extinguish fire, and the cargo being saved contributes to the ship; and where, a hole being cut to get at the fire, the waves get through it and damage the cargo, and the ship contributes therefor.

That the cargo may have a claim for contribution for consequential damage must be certain, and a good case to illustrate this rule may be that to which we have already previously adverted, where a mast was cut away and a hole thereby opened in the deck through which water penetrated to the cargo.<sup>2</sup>

<sup>1</sup> In *Nelson v. Belmont*, 5 Duer, 310, a vessel, bound from New Orleans to Havre, was struck by lightning, and set on fire. It struck the mizzen top-gallant mast, passed down the mizzenmast into the cabin and into the between-decks. Holes were cut in the upper deck, around the mizzen-mast, and water poured down into the between-decks, where the cargo was. This being ineffectual, the holes were stopped up to stifle the flames. The next day it was found necessary to put into a port of distress, and a Danish brig was engaged to accompany her. The passengers and eight kegs of specie, which constituted a part of the cargo, were removed to the brig. The two vessels arrived at Charleston, when the fire-engines of the city were employed. The vessel was filled with water, and after that she was pumped out, and the cargo discharged. The captain made some slight repairs to the vessel at Charleston, and then brought her to New York, where repairs to a large amount were made. Upon the trial it was held that the damage to the vessel occasioned by cutting the holes in the deck, when at sea, to pour down the water, that is, the mere expense of repairing the deck where these holes were cut, was to be allowed as a proper item for contribution; that the damage caused to the vessel by the swelling of the cargo was also proper; that only that part of the cargo should be contributed for which could be shown to have been damaged exclusively by the water; that the freight was neither to be contributed for nor to contribute; that the cargo was to contribute in the usual manner, including the amount allowed in general average; and that the specie on board the vessel, and which was transferred to the Danish brig, was liable to contribute, in common with any other portion of the cargo, to whatever might be a proper subject of general average.

<sup>2</sup> In *Maggrath v. Church*, 1 Caines, 196, the vessel, loaded with corn, encountered severe weather, and a mast was cut away for the general preservation. In cutting it away it was splintered, and in consequence thereof water entered the hold and damaged the corn. *Kent, J.*, said: "The corn being damaged by the cutting away of the mast is to be considered, equally with the mast, a sacrifice for the common benefit, — a price of safety to the rest; and it is founded on the clearest equity, that all the property and interest saved ought to contribute their due proportion to this sacrifice." In *Lee v. Grinnell*, 5 Duer, 400, 423,

## SECTION XVI.

## WHEN A LOSS OF FREIGHT IS TO BE ADJUSTED AS A GENERAL AVERAGE LOSS.

The ship earns its freight only by carrying its cargo to its destination. It is obvious, therefore, that, if goods be jettisoned, it is not only the owner of the goods who loses thereby, but the owner of the ship loses the freight which he would have earned by carrying those goods. There would seem to be, therefore, no reason whatever why he should not have a claim for contribution for the freight thus lost. This is in practice adjusted as an average loss, and the authorities sustain this view.<sup>1</sup>

*Hoffman, J.*, said: "The essential constituents of a case of contribution are, that the intelligence, the will, and the act of man have intended and produced the sacrifice of the thing for which compensation is sought, and have worked in whole or in part the preservation of the property from which it is claimed. The subjects destroyed must have been, in the contemplation of the party, as things to be destroyed. This rule admits, indeed, of a few guarded exceptions, but none which may not be considered, in the ordinary course of events, as comprehended within the intention. The cutting away of masts is probably as often accompanied with damage to boats and railings as otherwise, and this may well be assumed to have been an expected consequence. The leak, as in the case of *Magrath v. Church*, may reasonably be anticipated as a probable result of the splintering of masts when cut away." See also *Saltus v. Ocean Ins. Co.* 14 Johns. 138; *The Brig Mary*, 1 Sprague, 17; *Gage v. Libby*, *supra*, p. 366, n. 3; *Bond v. The Superb*, 1 Wall. Jr. 355, *supra*, p. 363, n. 1.

<sup>1</sup> Where a ship, bound from Havana to St. Petersburg, with a cargo of sugars, struck on the south shoal of Nantucket, and was there, after a jettison of part of her cargo, abandoned by the master and crew, and the ship afterwards floated off the shoal, and was met and brought into port by salvors, and there libelled for salvage, it was held that the full freight of the sugars of which there was a jettison, for the voyage, was to be allowed as part of the general average to be born by the ship and cargo, and the freight (*pro rata*) saved. *The Ship Nathaniel Hooper*, 3 Sumner, 542. In deciding the above case, Mr. Justice *Story* said: "In respect to the jettison of the cargo, it is clear that it constitutes a case of general average, to be borne by the ship, freight, and cargo, ultimately saved; and of course in that contribution the entire freight of the cargo thrown overboard is to be added to the loss as a part of the sacrifice, and is to be allowed to the ship-owners. This is the settled course in the adjustment of general average."

It is a general rule that a claim for freight follows the fate of a claim for the vessel. If a vessel is lost under circumstances which make her loss a case of general average, the freight which is lost is an additional sacrifice of the owner.

In adjusting an average loss on freight, the value taken when the freight is entitled to contribution is the gross freight at the port of contribution. If the freight is called on to contribute, only the net freight on the saved and carried contributes. This is usually ascertained by some rule established by usage, and this rule differs much in different places. As far as we can learn, this deduction is one half in New York, Virginia, Alabama, Georgia, Texas, and California; so it is in Havre. One third is deducted in Massachusetts, Maine, Pennsylvania, Maryland, and Louisiana. In England, from the gross freight, including primages, wages and port charges are deducted, and the remainder contributes.<sup>1</sup>

## SECTION XVII.

## WHEN A LOSS OF PROFITS IS SO ADJUSTED.

A loss on profits is never adjusted as a general average loss, on the ground that they were expected and would have been earned had not the goods been lost. It may be said at least that they are never contributed for under the name of profits; but if goods are valued and a loss of them is adjusted at this valuation, the profits might be actually contributed for, if, as is very common, they entered into the valuation.<sup>2</sup>

It has been earned in part, and would have been earned in full, but for the voluntary act which entailed the loss of the vessel, and, of course, prevented the earning of the freight from the shippers. *Nelson v. Belmont*, 5 Duer, 310, 322. In *Col. Ins. Co. v. Ashby*, 13 Pet. 331, 344, the court say: "The only other remaining point is, whether freight ought to have been brought into the account, either as a part of this loss or of the contributory value. The auditor's report, which was adopted by the court, allowed the freight as a part of the loss and also of the contributory value. It is perfectly clear that, if a part of the loss, the freight ought also to contribute. And it seems to us, that, as by the loss of the ship the freight was totally lost for the voyage, it was properly included in the loss, and as a sacrifice by the ship-owner for the common benefit."

If the voyage is broken up in any other way than in consequence of a voluntary sacrifice, the freight lost is not to be contributed for. *Lee v. Grinnell*, 5 Duer, 400, 431; *Nelson v. Belmont*, 5 Duer, 310, 323; *Tudor v. Macomber*, 14 Pick. 34. When freight is entitled to contribution, the value is the gross freight lost by the sacrifice. *Mutual Safety Ins. Co. v. Cargo of Ship George, Olcott*, Adm. 157. See also *Gray v. Waln*, 2 S. & R. 229; *Magens*, 272, 277, Case 24; *The Ann D. Richardson*, Abbott, Adm. 499.

<sup>1</sup> *Dixon on Mar. Ins. & Average*, 149. <sup>2</sup> *The Nathaniel Hooper*, 3 Sumner, 542.

## SECTION XVIII.

## WHAT EXPENSES ARE ADJUSTED AS A GENERAL AVERAGE LOSS.

We have already seen that expenditures for a common benefit are frequently charged on the interests receiving the benefit, and then they are adjusted as a general average loss.

By the law merchant among all civilized nations, the master of a vessel has certain definite powers and duties, which relate mainly to the navigation of the vessel, the control of all on board, and the care of the ship and all the property it contains. These powers and duties belong to his office, and are much the same everywhere. Besides these, however, he has sometimes other powers and duties springing from necessity. We have had occasion to consider these powers from necessity in connection with other topics, and also to some extent in a previous part of this chapter. Where expenses are incurred by the exercise, on the part of the master, of one of these powers, two things are to be remembered: first, that it certainly is not among the general powers and duties of his office to sell the ship or the cargo, or to borrow money on the pledge of ship or cargo, or in any other way on the responsibility of the ship-owner or shipper; but, secondly, that he may be justified in doing any or all these things by a sufficient necessity. By such necessity he is made the agent of the ship-owner or shipper, and binds them by his acts in the same way as if he had for these acts their express authority.<sup>1</sup> Thus, we have seen that the master

<sup>1</sup> *Fontaine v. Col. Ins. Co.* 9 Johns. 29. This was an action on a policy of insurance on the cargo of a ship from Guadaloupe to New York. The vessel was captured by a British cruiser and carried into Antigua, and libelled in the Admiralty Court there. The master put in a claim, and the goods were detained for further proof, but were delivered to the master on his giving security for their appraised value and paying the costs. The master procured Hall and Rose, merchants at Antigua, to become security, and also to pay the costs and other expenses for the ship and cargo; and for their indemnity he drew bills of exchange on his owner in New York, and pledged the ship and goods to Hall and Rose, to secure the amount, which included a commission of five per cent, charged by them on the sums advanced, and a premium of insurance which they paid to insure the ship and cargo so pledged, from Antigua to New York. The cargo was delivered to the agent of Hall and Rose in New York, and the insured, to obtain possession of his property, paid his proportion of the charges and expenses,

may sell the vessel;<sup>1</sup> but such a sale, although it may make a constructive total loss, will not be adjusted as a general average loss. So, too, he may sell the goods, if perishable,<sup>2</sup> or for other sufficient reason; and this may constitute an analogous loss of the goods, which would not, however, be adjusted as a general average loss, any more than a loss by sale of the ship. We have already inferred, from the adjudication on this subject in respect to general average, that here, as so often elsewhere, it is necessary to distinguish between expenses for which the ship alone is bound,

including the commissions and premium of insurance, and brought this action to recover the amount so paid from their insurers. It was held that, the master having acted with good faith, and the charges being reasonable and necessary, the insured were entitled to recover this amount. The court said: "The plaintiff's cargo was mortgaged to Hall and Rose, in consideration of their becoming security to answer for its value, and there is no reason to doubt of the power of the master to mortgage it. The principles of the maritime law clothe him with the power of agent of the cargo, when cases of extremity occur. He may sell a part, or he may hypothecate the whole cargo, even for the necessary repairs of the ship, when that act is required to enable him to continue the voyage. Though, ordinarily, he is the mere carrier of the cargo, yet in a case of difficulty and peril, he becomes *ex necessitate* a trustee of it, with a large and liberal discretion, and this character is then given to him from public policy, for without this power the cargo might be left to perish. If the master has this power over the cargo for repairs to the ship, it exists, in at least equal force, when the interest of the cargo is directly in question; and this case contains intrinsic evidence that the terms on which the assistance of Hall and Rose was procured were as favorable as any that could have been obtained. The plaintiffs had no agent or consignee at Antigua, for none appears, or is to be presumed. It was an island to which the ship was carried by the captors. To whom was the captain to apply for aid? If Hall and Rose had exacted exorbitant compensation or security, the presumption would have been different, and it might have been incumbent on the plaintiff to have shown that other applications for security had been made, and failed. The indemnity required by Hall and Rose, of a mortgage of the cargo released, was reasonable for them to ask, and within the power of the captain to give; and, having taken it, the insurance was necessary to render the security perfect, and the premium for the insurance was no more than a necessary charge attending the taking of the security."

<sup>1</sup> See *The Catherine*, 1 Eng. L. & Eq. 679, 681; *Am. Ins. Co. v. Ogden*, 15 Wend. 532; *Somes v. Sugrue*, 4 C. & P. 276; *Robinson v. Com. Ins. Co.* 3 Sumner, 220.

<sup>2</sup> *Jordan v. Warren Ins. Co.* 1 Story, 342; *The Gratitude*, 3 Rob. Adm. 240, 259; *Hugg v. Augusta Ins. Co.* 7 How. 595, 609; *Vaughan v. Western Ins. Co.* 19 La. 54; *Vlierboom v. Chapman*, 13 M. & W. 230; *Smith v. Martin*, 6 Binn. 262.



because they belonged to the duty of navigation, and those which, being incurred to relieve all the property from a common danger, which lies outside of the ordinary perils of navigation, give a right to general contribution, and are to be adjusted as a general average loss.

But he may borrow money on the ship, or on the cargo, or may raise it by sale of the cargo or of a part, under such circumstances and for such purposes as may create a general average claim.<sup>1</sup> Through all these cases, whether they belong to particular average or to general average, there runs one question, — Was the borrowing, or the sale, justified by necessity? If so, the adjuster will cast the loss upon those interests to benefit which the money was raised. If not so justified, then he will cast it upon the party only who was in the wrong, whether he did it personally or by one for whom he was responsible.

It is difficult to determine what this necessity must be to justify this act; and in its connection with different topics, we fully consider this question. Here, in its bearing on the duty of the adjuster, we will only say, that it is quite certain that, by the law merchant, different degrees of necessity authorize and justify different classes of acts; thus it may be said that the master may make repairs and bind his owner for them, on the simple ground that such repairs were on the whole expedient or desirable; and yet even here it is plain that the adjuster would not cast upon all the interests jointly very large and expensive repairs of the ship, unless they were justified by an expediency which amounted almost, if not quite, to a necessity.<sup>2</sup>

<sup>1</sup> *The Gratitude*, 3 Rob. Adm. 240, 263; *Giles v. Eagle Ins. Co.* 2 Met. 140, 144; *The Mary*, 1 Sprague, 51; *The Constancia*, 4 Notes of Cases, 677.

<sup>2</sup> In the case of *The Ship Fortitude*, 3 Sumner, 228, 237, which was a suit *in rem*, founded on a bottomry bond given by the master of the ship for moneys taken up for the repairs of the ship, the main question raised by the pleadings was upon the necessity of the repairs, the respondents contending that they were unnecessarily, if not fraudulently, made. In deciding this question, Mr. Justice Story remarked: "In relation to what are necessary repairs in the sense of the law, for which the master may lawfully bind the owner of the ship, I have not been able, after a pretty thorough search into the authorities and text-writers, ancient and modern, to find it anywhere laid down in direct or peremptory terms, that they are such repairs, and such repairs only, as are absolutely indispensable for the safety of the ship or the voyage, or that there must be an extreme necessity, an invincible distress, or a positive urgent incapacity, to justify the master in making

If the master sells a cargo or a part of it for insufficient reasons, he sells it without authority. If the owner of the cargo be also the owner of the ship, it is his servant who has done him this wrong, and he has no remedy unless he may have one against the master. If the shipper be not the ship-owner, then he is injured by the master, for whom the ship-owner is responsible; but in neither case would the loss come within the scope of general average.

Text-writers generally make a distinction between those general average claims which arise out of sacrifices and those which rest on expenditures. We are satisfied, however, that this distinction is unreal, and can have no influence on the adjustment; the three essentials of all general average claims applying equally to sacrifices and expenditures; that is to say, they must be voluntary, necessary, and effectual.

It must be especially remembered in the adjustment, that where the claims are founded on expenses, only that part of the property for the benefit of which the expenses are incurred is liable for it.<sup>1</sup>

the repairs. The general formulary of expression found to be laid down is simply that the repairs are to be necessary, without in any manner pointing out what repairs are, in the sense of the law, deemed necessary, or what constitutes the true definition of necessity. But a thorough examination of the common text-writers, ancient as well as modern, will, as I think, satisfactorily show that they have all understood the language in a very mitigated sense; and that *necessary repairs* mean such as are reasonably fit and proper for the ship under the circumstances, and not merely such as are absolutely indispensable for the safety of the ship or the accomplishment of the voyage."

<sup>1</sup> Where a vessel and cargo were captured, and the cargo, but not the vessel, was proceeded against in the Admiralty Court, and a part condemned and the residue released, and, to prevent an appeal and avoid further detention, the master agreed to pay a specific sum as a ransom, and sold a part of the cargo, being more than a moiety of the part insured, to defray the expenses and pay the ransom, it was held that the sum paid for ransom and expenses was not general average, having been paid solely for the benefit of the cargo, and not to obtain a liberation of the vessel, which was not brought into controversy, but must be borne as a particular average upon the cargo alone. *Vandenheuevel v. United Ins. Co.* 1 Johns. 406. See also *Watson v. Mar. Ins. Co.* 7 Johns. 57; *Jumel v. Mar. Ins. Co.* 7 Johns. 412; *Peters v. Warren Ins. Co.* 1 Story, 463, 469; *Benecke, Pr. of Indem.* 223. The principle of contribution is, that everything which is saved by common expense and labor shall pay that expense in proportion to its value; therefore property taken from the vessel by the owners, before the expense was incurred by which the vessel was saved, is not subject to contribution, as it cannot be said to have been saved by that expenditure. *Bedford Ins. Co. v. Parker*, 2 Pick. 1, 10. In *Castellain v. Thompson*, 13 C. B. N. S. 105, T. & Co., the

If for the ship only, the cargo does not contribute ; if for the cargo only, the ship does not contribute ; and if for a part of the cargo only, it must be adjusted as a loss, partial or total, of that part only.

Wherever an act is done for the safety both of the ship and cargo, and therefore founding a claim for general average loss, all the expenses directly and necessarily incident to that act, and connected with it, are to be adjusted as a part of the general average claim. Thus, if the ship put into some port for repairs, under circumstances which make the expense of these repairs a general average loss, then all the expenses in bringing the ship into port and clearing her out again, piloting,<sup>1</sup> towage,<sup>2</sup> charges of watch-

owners of flats or barges at Liverpool were employed by H. & Co. to carry certain copper ore to one L., the owner of crushing-mills at Birkenhead, who, in consideration of being employed to crush the ore, agreed to indemnify H. & Co. against all risk in the transit. Whilst on its way to Birkenhead, the barge with the ore on board foundered in the river. The barge-owners gave notice of the loss to the shippers, and requested to be employed to raise the cargo ; but were answered that they had better see L., as the shippers had nothing to do with it. But L. referred them to M., with whom he was insured, for orders, and the latter said : " You had better go on with it, and do the best you can for us." T. & Co. thereupon proceeded with the work, and, after incurring great labor and expense, succeeded in recovering the ore. It was contended, in behalf of T. & Co., that they were entitled to claim the expenses incurred by them as general average, since the ore was on board their vessel, sunk at the bottom of the river, and the expenses were incurred in recovering the vessel and her cargo. But it was held that this claim could not be allowed, as it was not for expenses incurred by the master or the owners for the benefit of all concerned, but for those incurred by virtue of a contract entered into with the insurer, the person ultimately interested in recovering the ore.

<sup>1</sup> Benecke, Pr. of Indem. 192 ; 2 Phillips, Ins. § 1326.

<sup>2</sup> *Wightman v. Macadam*, 2 Brev. 230, 233 ; Beawes, 150. This charge was allowed in a London adjustment of an average in case of an American vessel putting into that port. 2 Phillips, Ins. § 1326, in notes. In *Lyon v. Alvord*, 18 Conn. 66, the vessel of the plaintiffs, on her way from Albany to Westport, with a cargo of lumber, a part of which was consigned to the defendant, was driven, by stress of weather, on a rock in Long Island Sound, and a hole was broken in her hull ; in consequence of which she filled with water, and became unable to proceed on her voyage, and was in danger of sinking. The plaintiffs thereupon procured her to be towed into the harbor of Southport, where they obtained another vessel to take the cargo to Blackrock, where it was delivered to the defendant. There was no evidence that the defendant requested any of the acts, either of towing the vessel into Southport or in procuring the cargo to be transported to Blackrock. The action was brought by the ship-owners against the owner of the lumber

men,<sup>1</sup> of men hired to assist in pumping the ship,<sup>2</sup> cutting a way for the ship through ice,<sup>3</sup> and all the expenses necessarily incurred for the repair of the ship, necessary loading or unloading,<sup>4</sup> and all other expenses of similar character, are treated in the adjustment as a part of the general average claim;<sup>5</sup> only, however, so far as the expenses were for the common benefit.

for contribution. It was held that the acts done by the plaintiffs, from the time the vessel became disabled until she was brought into the harbor of Southport, being found necessary, were proper subjects of a general average, and the plaintiff was accordingly entitled to recover; that if the exception had been properly taken, the defendant would not have been liable for the expense of taking the lumber from Southport to Blackrock; unless this was part of the process of lightening the vessel or of fitting it for repairs, in order to save it and the cargo, and to complete the voyage; in which case this expense also would be the subject of a general average; and that as the objection of the defendant, on the trial, went to the whole claim of the plaintiffs and the whole evidence to support it, without discrimination, and no distinct question as to the last-mentioned expense was made, a judgment covering the entire expense would not, for that reason, be reversed.

<sup>1</sup> Stevens on Average (5th ed.) 23.

<sup>2</sup> Orrok v. Com. Ins. Co. 21 Pick. 469, 470.

<sup>3</sup> 1 Magens, 67.

<sup>4</sup> The Copenhagen, 1 Rob. Adm. 289, 294; Plummer v. Wildman, 3 M. & S. 482, 487; Barker v. Phoenix Ins. Co. 8 Johns, 307, 318; Da Costa v. Newnham, 2 T. R. 407.

In *Hall v. Janson*, 4 Ellis & B. 500, 507, where a ship, being damaged by stormy weather, was forced to go out of her course to be repaired, and for this purpose the cargo was necessarily unloaded and loaded again, the court said: "The expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship, that she may be made capable of proceeding on her voyage, have been held to give a claim for general average contribution; for the acts which occasion these expenses become necessary from perils insured against; and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight."

<sup>5</sup> Where a survey is properly made at a foreign port, in order to ascertain the amount of damage and the propriety of making repairs, if the damage is a peril insured against, the expense is to be contributed for. *Potter v. Ocean Ins. Co.* 3 Sumner, 27.

Whatever charges are necessarily incurred where a vessel is compelled to seek refuge from a tempest, in a port out of the course or short of her port of destination, for the mutual safety of the ship and cargo, the owners of each are respectively bound to contribute in proportion to their several interests. The following charges appear to be of that description: attendance on the vessel coming into port; pilotage; harbor-master and health officer's charges; wharfage to unload, and unloading; and, perhaps, the protest. *Wightman v. Macadam*, 2 Brev. 280.

Thus, for example, if the ship could have been as well repaired with the cargo on board, and the cargo only unloaded for its own benefit, the expense thence arising would be charged to the cargo only;<sup>1</sup> and if, after the cargo is removed, the ship's stores are taken out, this is of no benefit to the cargo, and is chargeable to the ship only.<sup>2</sup> The question to which we have already referred more than once, and which, as we have seen, comes up in many cases of average and adjustment, is this: Do certain expenses which were incurred by the ship belong to her especial duty and obligation, or, lying outside of this duty, should they be considered as voluntarily incurred for the common benefit of the ship and cargo? It is this question which causes the difference between English and American adjudications, to which we have already referred. The English courts holding that, as the owners of a vessel are bound to keep her in repair, when she goes out of her way for the purpose of repair, the expenses thence arising are not a general average loss, unless the repairs were made necessary by the voluntary loss or destruction of some part of the vessel for the common benefit.<sup>3</sup> Whereas, in American law and practice, the

<sup>1</sup> In a case where a vessel was aground in five feet of water at her bow and eight feet at her stern, it was held that, if she had sunk in deep water, the unloading of the cargo might have been necessary for raising her; in which case, or at any rate, if unloading the cargo had sufficed to raise her, and she was to be repaired, the expense of unloading might have been a case for contribution, if the cargo was also benefited thereby; but if the cargo was unloaded for its own preservation merely, and not for the benefit of the vessel, or if the vessel were raised for its own benefit only, and not for the benefit of the cargo, there would be no general average for the expense of unloading in the first case, or of raising the vessel in the last. *Fireman's Ins. Co. v. Fitzhugh*, 4 B. Mon. 160, 167.

<sup>2</sup> *Stevens on Average* (5th ed.), 22.

<sup>3</sup> In the early case of *Lateward v. Curling*, 1776, Lord *Mansfield* seems to have been of opinion that the expense of extraordinary wages and provisions during the time a ship goes into a port to repair is not the subject of general average, unless in a case of urgent necessity. The action was brought upon a policy of insurance on a ship to recover the amount of wages and provisions expended during the time the ship went from Bengal to Bombay to repair. His lordship decided against the action, but said that there might be cases where exceptions to the general rule should be allowed; but that, in order to consider a case as excepted, it must be an expense absolutely necessary, and such as could not possibly be avoided, owing to some of the perils stated in the policy. *Park on Insurance* (8th ed.), 288.

In *Da Costa v. Newnham*, 2 T. R. 407, tried twelve years later, it was decided

going out of her way for necessary repair is itself a voluntary

that, where a ship was obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, became general average. The court laid stress on the fact that the sailors were not employed as such to make the repairs, but were discharged, and then hired anew as common workmen to perform this extra labor; intimating that, had they remained on board as sailors, the expense of their extra wages and provisions would not have been allowed. Mr. Justice *Buller* said: "As to the wages and provisions, this is not like the case where a ship is detained by an embargo, where the court have said that the expense shall fall on the owner only, and the freight must bear it; but this is a question of general average, the ship having been obliged to go into port for the general benefit of the whole concern. A passage from Beawes is mentioned in Park, 143, showing the law in foreign countries upon this subject; that when a ship is forced by storm to enter into a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost, in such case the wages and victuals of the crew are brought into an average from the day it was resolved to seek a port to refit the vessel to the day of her departing from it, with all the charges of loading, unloading, anchorage, pilotage, and every other expense incurred by this necessity. But I do not know that this point has ever been settled in England. There is one case mentioned in the same book [*Lateward v. Curling*, *supra*], where Lord Mansfield seemed to approve of this rule; but it is not necessary to determine that point now, for it appears that the crew had been all discharged, and these men were only employed as common workmen."

In *Fletcher v. Poole*, 1769, Lord *Mansfield*, and afterwards in *Eden v. Poole*, 1785, and in *Robertson v. Ewer*, 1 T. R. 127, 132, Mr. Justice *Buller* held that the expense incurred for wages, provisions, &c. of the seamen during a detention to repair could not be allowed as a charge against the insurer on the ship, but must be borne by the freight. Park (8th. ed.), 116, 117. These decisions have been confirmed by the recent case of *De Vaux v. Salvador*, 4 A. & E. 420, 6 Nev. & M. 718.

In *Plummer v. Wildman*, 3 M. & S. 482, one of the leading English cases upon this subject, a ship was run foul of by a brig, which was unavoidably driven against her by the violence of the wind and weather, by which accident her false stem and knees were broken, and the master was in consequence obliged to cut away part of the rigging of her bowsprit, and to return to port to repair the damage sustained by the accident and cutting away, without which repairs the ship could not have prosecuted her voyage or safely kept at sea. The action was brought for contribution for work and labor and for money paid. It was held that the amount of the expenses of repairing to be placed to the account of general contribution must be strictly confined to the necessity of the case, and that the arbitrator would have to determine how much was expended upon such repairs as were absolutely necessary to enable the ship, with her cargo, to prosecute the voyage; and that for so much, and no more, the defendant would be liable to contribute; but that the ship-owner must bear the captain's expenses in port

sacrifice or loss, on the part of the vessel, for the common bene-

during the unloading, repairing, and reloading, and that crimpage to replace deserters did not come under general average. Lord *Ellenborough*, C. J., said : " If the return to port was necessary for the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting the voyage, unless she returned to port and removed the impediment. As far as removing the incapacity is concerned, all are equally benefited by it, and therefore it seems reasonable that all should contribute towards the expenses of it; but if any benefit *ultra* the mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the ship-owner only, it will not come under the head of general average; but that will be a matter of calculation upon the adjustment."

In the subsequent case of *Power v. Whitmore*, 4 M. & S. 141, it was decided that the wages and provisions of the crew, while a ship remained in port, whither she was compelled to go for safety of ship and cargo, in order to repair a damage occasioned by a tempest, were not the subject of general average; nor were the expenses of such repair; nor the wages and provisions of the crew during her detention in port, to which she returned, and was there detained on account of adverse winds and tempest, since there was here no sacrifice of any part by the master, but only of his time and patience, and the damage incurred was by the violence of the wind and weather. Lord *Ellenborough*, in the decision, referred to the preceding case of *Plummer v. Wildman*, and said, that " this was not like the case recently before the court, where the master was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed."

In *Jackson v. Charnock*, 8 T. R. 509, A let his ship to B for a voyage, engaging to keep it in repair during the whole time, for which he was to receive freight on the return of the ship. It became necessary for the safety of the ship during the voyage to put into a port to refit. It was held that the expense of repairing must be borne entirely by A, and that B was not liable to contribute to it in proportion to his interest in the cargo, as for a general average. But here the court treated the question as depending wholly on the construction of the contract, in which the owner engaged to bear the expense of repairs. The decision, however, would doubtless have been the same in the absence of any such agreement, as the English law considers the ship-owner bound to repair, whether there are express stipulations to that effect or not.

The general principle of the English law deducible from these decisions appears, therefore, to be that if a vessel is compelled to put into port to repair a damage which is itself the subject of a general average, the necessary expenses thereby incurred to enable the ship to pursue her voyage may be the subjects of a general contribution; but that, if the losses sustained by the ship are of the nature of particular average, then the expenses incurred in repairing them give no claim

fit.<sup>1</sup> Our notes will show the adjudications on this subject. We

to a general average, but must be borne by the ship-owner alone. Chancellor *Kent* says: "The result of the decisions in *Plummer v. Wildman* and *Power v. Whitmore* is, that where the general safety requires a ship to go into port to refit, by reason of some peril, the wages and provisions of the crew during the detention are not the subject of general average; but the other necessary expenses of going into port, and of preparing for the refitting the ship, by unloading, warehousing and reloading the cargo, are general average. The cost of the repairs, so far as they accrue to the ship alone as a benefit, and would have been necessary in that port, on account of the ship alone, are not average. Yet if the expense of the repairs would not have been incurred but for the benefit of the cargo, and might have been deferred with safety to the ship to a less costly port, such extra expense is general average." 3 *Kent*, Com. 235, 236. In *Sharp v. Gladstone*, 7 *East*, 24, where a ship was forcibly detained in a foreign port, and the owner abandoned first the ship and then the freight to the different sets of underwriters thereon, who paid as for a total loss, after which the ship was liberated, reshipped her cargo which had been taken out, and returned home earning freight, which was received by the assured, it was held that the underwriters should contribute according to their respective interests, among other expenses, for the wages and provisions of the crew from their liberation in the foreign port till their discharge in the home port, and also for the wages of the crew during their detention, provisions being supplied by the foreign government. In *De Vaux v. Salvador*, 4 *A. & E.* 420, where a ship was insured with the usual warranty as to average, it was held that the expense of the wages and provisions of the crew, during the time that she was detained in repairing damage done to herself by perils of the sea, were not a loss for which the underwriters were liable.

<sup>1</sup> In *Padelford v. Boardman*, 4 *Mass.* 548, it was decided that when, in the course of a voyage, a ship insured, being damaged by winds and storms, voluntarily seeks a port to refit, the expenses consequent thereon, including the wages and provisions of the crew during the detention, are a general average; but that the repairs are a distinct charge upon the vessel. In noticing the cases of *Fletcher v. Poole*, and *Eden v. Poole*, *supra*, Mr. Justice *Sewall* said: "Both these cases exclude the circumstance of a voluntary and deliberate resort to a port for the particular purpose of refitting, with a view to the common safety of the vessel and cargo, and to avoid the impending danger of continuing the voyage without some necessary repairs." Again he says, p. 554: "A liberal construction in this respect appears conducive to the interest of insurers, in the benefit they derive from every reasonable precaution against impending and extraordinary risks, such as the continuing at sea with a vessel disabled in her sails and rigging. By rendering the concerned liable in a general contribution to defray the extraordinary expenses of seeking a port, and of the detention there to refit, the hazard from opposing interests is avoided; and a security common to all the concerned is purchased, as it ought to be, at their common risk and expense. Upon the whole, there may be some difficulty in deciding, under the circumstances of a particular case, whether a detention by any accident happening after the commencement of a voyage is or is not a case of general average. But when the case is established



should agree with the remark of Mr. Arnould, that there is hardly

to be of that nature, and sailors' wages and provisions make a part of the expense necessarily incurred, this seems a sufficient reason for allowing them. The text-writers, and the ordinances and decrees of several great commercial republics favor it; and there is no opposing authority, applicable to the case supposed, in the decisions of this court, or of the courts of Great Britain, from whom our rules of maritime law are generally derived. But the definition of a general average, received in the courts of both countries, includes the wages and provisions of seamen, in cases like this now under consideration." It is to be observed, in explanation of the last sentences of this citation, that this case was decided before those of *Plummer v. Wildman*, and *Power v. Whitmore*, the latter being tried in 1815, and the former in 1808. In an earlier case in New York, it was held that if a vessel were, from sea damage, obliged to bear away to a port of necessity in order to refit, the wages and provisions, from the moment of bearing away to the period of sailing on her original voyage, constituted a subject of general average. *Walden v. Leroy*, 2 Caines, 262. In delivering the opinion of the court, *Kent, C. J.*, said: "It is necessary that the mariners should remain for the purpose of proceeding to the port of discharge, as soon as the inevitable misfortune, the *casus fortuitus*, creating the delay is removed. The cargo might be sacrificed at the intermediate port, if the crew were not to be detained, and the expenses of their detention being for the common benefit, ought to be apportioned as a common burden." But *Livingston, J.*, in a dissenting opinion said: "I am for confining a general contribution for *extra* wages and provisions to a case of capture, or where a vessel goes into port to avoid an enemy, or where some other step is taken by the master, *without any previous injury to the vessel alone*, evidently for the benefit of the whole, and with the view of escaping from an impending peril. All these cases rest on the same principle. No particular accident having happened to the vessel, which it is the owner's special duty and interest to repair, there is no reason why he should personally bear a heavy loss, which, in most of the cases put, is *voluntarily* incurred, to prevent a general one, greater still. Hence it will result, and perhaps a safer rule cannot be followed than the one suggested by Abbott, which is, that if the injury to be repaired be not *of itself* an object of gross average, neither shall any of the incidental or consequential charges become so. If a shipper be not obliged to find materials, or carpenters, to repair injuries from tempest or stranding, why should he be taxed to pay or victual the crew?"

Where a vessel during her voyage puts into a port of necessity, and is repaired, and afterwards proceeds on her voyage, and is totally lost, the insured is entitled to recover the partial loss arising from the repairs, and general average consequent thereon, in addition to the total loss. *Saltus v. Com. Ins. Co.* 10 Johns. 487.

Where a vessel insured, having lost her boat and camboose, and had her mainsail damaged in a gale, repaired the sail at sea with duck taken from the cargo, and purchased an old boat and camboose at a port of necessity, and, upon her arrival at home, sold the sail, boat, and camboose, and procured new ones, it was held that the loss was particular average; but other repairs made abroad from strict necessity to enable the vessel to return, and which were of no value after

any point, even in the perplexed doctrine of general average, in

her return, were held to come under general average. *Brooks v. Oriental Ins. Co.* 7 Pick. 259.

If, after a vessel is disabled, the master can, in a reasonable time, communicate with his owners, it is his duty to do so before making repairs; and such delay does not relieve the owner of the cargo from contribution. *Sherwood v. Rugles*, 2 Sandf. S. C. 56.

In *Sage v. Middletown Ins. Co.* 1 Conn. 239, 243, the distinction mentioned in *Da Costa v. Newnham*, 2 T. R. 407, between the wages of the seamen, as such, during a detention, and the wages of extra workmen, or of the seamen discharged and hired anew as workmen, as subjects for contribution, is affirmed, and the reason upon which it is founded given. The court say: "The allowance of the charge for the services of the master and mariners was also incorrect, Mariners' wages are sometimes allowed during detention as a general average; but I find no case in which they have been allowed under circumstances like the present. This, however, is not a case presenting simply a charge for mariners' wages. It is an extra allowance for labor on the repairs, while they remained a part of the crew not discharged. If this were allowed against the underwriters, either the mariners would receive a double compensation for their services, or the owner would receive from the underwriters the price of day laborers for services paid by him at a less price by the month."

In *Dunham v. Com. Ins. Co.* 11 Johns. 315, a ship was insured "at and from New York to Liverpool, and at and from thence back to New York." On her outward voyage she sustained so much damage by tempests, &c. that on her arrival at Liverpool she was obliged to go into dock to be repaired, which detained her from the 1st of December, 1810, to the 24th of March, 1811. The cargo having been delivered, and freight earned before the first of December, it was held that the wages of the master and crew and provisions on board were not general average, and that the underwriters on the ship were not liable for them.

The case of *Wightman v. Macadam*, 2 Brev. 230, was somewhat similar in principle. A vessel had been chartered by the defendant for a voyage from Charleston to Havana and back. The owner covenanted that the ship was tight, staunch, well fitted, tackled, and provided with every requisite, and both men and provisions fitting for the voyage. On the return voyage, in consequence of damage from the perils of the seas, the vessel was compelled to put into Savannah to refit. The cargo was landed and delivered to the defendant, who paid a *pro rata* freight on the same, and sold it at Savannah. The plaintiff made a deduction for the freight from Savannah to Charleston. The action was brought for contribution, among other things, for the wages and the sustenance of the crew during the detention. The court held that the defendant was not liable to contribute to this expense, as it was not necessary to the safety of the goods. But neither this case nor that of *Dunham v. Com. Ins. Co.* *supra*, controverts the general principle of the American law upon the subject; for in both cases the cargo, having been delivered before the expenses in question were incurred, was of course in no way benefited by them. This fact determined the decisions in both cases; for in *Wightman v. Macadam*, the ex-

which there is such a great diversity in the laws of mercantile states.<sup>1</sup>

## SECTION XIX.

OF THE VALUE OF THE CONTRIBUTORY INTERESTS ON WHICH THE ADJUSTMENT SHOULD BE FOUNDED.

### A. *Of the Ship.*

It may be doubted whether there is now any uniformity of rule or practice in regard to the contributory value of the ship, on an adjustment of general average. Ancient maritime codes prescribe certain rules, which are now no longer in use. They are collected

penses incurred before the discharge of the cargo, namely, for attendance on the vessel coming into port, pilotage, harbor-master and health officer's charges, wharfage to unload, and unloading, &c. were allowed as subjects for contribution. And in *Dunham v. Com. Ins. Co.* the court say: "It is clear that the expenses for wages and provisions during the time the ship was detained at Liverpool cannot be brought into general average. They were not incurred for the benefit of cargo or freight. The cargo had arrived at its port of discharge, and had been delivered, and freight earned, before the expenses in question were incurred." So also the decision in *Williams v. Suffolk Ins. Co.* 3 Sumner, 270, 13 Pet. 415, that the expenses of going into port to refit are general average only when the voyage has been or might be resumed; for if the voyage is abandoned, and the cargo is obliged to be transhipped, of course the expenses attendant upon the detention are in no way conducive to the benefit of the cargo, and there is accordingly no reason why it should contribute toward them.

In the case of *Union Bank of S. C. v. Union Ins. Co. Dudley*, S. C. 171, the English rule was adhered to; but there the policy referred to the usages of London as the standard by which the liabilities of the company were to be ascertained, although it was stated that the custom as to wages was the same in the city of Charleston.

The wages and expenses of the crew during repairs made at the port of delivery are not to be contributed for, even if the insurance be on time. *Perry v. Ohio Ins. Co.* 5 Ohio, 305.

In addition to those already cited, the American rule is sustained in the following cases: *Clark v. United Ins. Co.* 7 Mass. 365; *Potter v. Ocean Ins. Co.* 3 Sumner, 27; *Bixby v. Franklin Ins. Co.* ib. 46, in note; *Peters v. Warren Ins. Co.* ib. 400; *Henshaw v. Mar. Ins. Co.* 2 Caines, 274; *Spafford v. Dodge*, 14 Mass. 66, 74; *Barker v. Phoenix Ins. Co.* 8 Johns. 307; *Ross v. Ship Active*, 2 Wash. C. C. 226; *Thornton v. U. S. Ins. Co.* 3 Fairf. 150; *Hanse v. New Orleans Ins. Co.* 10 La. 1; *The Brig Mary*, 1 Sprague, 17; *Dyer v. Piscataqua Ins. Co.* 53 Me. 118, 122.

<sup>1</sup> 2 Arnould on Ins. 911.

by Mr. Stevens in his essay on general average, and we give in our notes a brief statement of them, because they are still serviceable to illustrate the principles which should be applied to this question.<sup>1</sup>

We consider that the general principle, whatever may be the method or difficulty of its application, is that stated more than fifty years ago by Mr. Justice *Sewall*: "In averages and contributions,

<sup>1</sup> By the *Consolato del Mare*, c. 94; the *Code de Commerce*, art. 304 and 401; the *Ord. de la Mar. tit. du fret*, art. 7 and 20; des *avaries*, art. 3; du *jet.*, art. 19; the Ordinances of Florence, Amsterdam, and Leghorn, the ship contributes for half her value. By the Ordinances of Philip II., of Konigsburg, and of Portugal, she contributes for her full value. By the Ordinance of Hamburg, tit. 21, art. 8, she contributes according to her true value in the state in which she comes from the sea, and the whole freight, deducting wages, pilotage, and other charges belonging to simple average. The Ordinances of Prussia, of Genoa, of Spain regarding the commerce with India, and of Copenhagen, are to the same effect; Pruss. §§ 1868-1870; Stat. Jan. l. 4, c. 16, § *omnia jacta*; *Recopilacion de Leyes de las Indias*, No. 80, l. 9; Tit. 39, Ley, 10. By the *Ord. de Bilbao*, art. 1 and 2, the ship contributes for her full value, as estimated by competent persons, the freight for one half, and the whole of what is paid by the passengers, if any. By the Ordinance of Sweden the ship contributes according to her value as estimated by surveyors upon her arrival. But if she be valued in the policy, she contributes according to that value. The Danish articles have the same provision. If no valuation is made, the ship contributes according to her value at the place of departure, or at the time when the order for insuring her was given. Benecke, *Pr. of Indem.* 323, 324, 325. The *Laws of Wisbuy* and the Ordinances of Antwerp and Rotterdam provide that the owner of the ship shall contribute for her whole value, or her whole freight, at the option of the proprietors of the cargo. The custom in Holland was the same. *Ad. Vermer*, annot. p. 118. The *Laws of Oleron* gave the option to the owner. The *Consolato del Mare*, c. 96, provides that, if the master receives freight for his whole cargo, the same shall be included in the general contribution. By the Ordinance of Louis XIV., No. 579, both ship and freight contribute for one half. The gross freight is only understood here. 1 *Magens*, 58.

The difference in these ordinances is easily reconciled, for it proceeds from the same grounds, viz. the impossibility of employing a ship in any voyage without wear and tear, and consequently losing the value she had when she commenced it, and the supposition that one half or one third of her freight would be expended in paying men's wages and other charges. 1 *Magens*, 58.

Quentin van Weijtsen upon this subject says, *Tr. des Av.* p. 31: "They ought in reason and justice to carry in common contribution the whole value of the vessel, as well as the entire freight which the master receives for the voyage." Upon this passage Mr. Stevens says: "This, which was his opinion in 1563, is now the practice in England." *Stevens & Benecke on Av. (Phil. ed.)* 211.

the value, as between the parties interested in the adventure of property liable, is to be taken as it may be estimated at the time and place of its adjustment."<sup>1</sup> The various rules adopted at different

<sup>1</sup> *Clark v. United Ins. Co.* 7 Mass. 365, 370. In this case a ship was insured from the United States to Cork or Liverpool, either or both, for two thousand dollars, — fifteen hundred on the vessel and five hundred on the cargo, the vessel being valued at six thousand dollars. In consequence of the fog, and contrary to the intentions of the master, the ship passed Cork, and, finding it impracticable to beat back to that port, although it was practicable to go to Liverpool, the master bore away to Dublin to gain information of the state of the markets, and in the course thither a loss was incurred. It was agreed by the parties that the expenses and damages incurred by the disaster, computed at the sum of \$4,924, should be adjusted as a general average upon the ship, cargo, freight, and a deck load; that in this adjustment the value of the property as at Dublin should be taken, and that the ship was there worth \$8,000, — \$2,000 more than at the commencement of the voyage, — the cargo, \$5,510; the freight, \$1,094; and the deck-load, \$332; that there had been sustained and paid thereon a loss and contribution of 28 $\frac{1}{4}$  per cent; and that the value of the cargo, as shipped, was \$2,000. The action was brought upon the policy by the part-owner of the ship and cargo for the amount contributed by his part thereof towards this loss. The court were to determine what sum for the loss demanded was recoverable upon the policy, — whether the whole sum supposed to be assessed upon the plaintiff, and paid by him, upon his quarter part of the ship and cargo, or only the same rate of loss upon the sum insured which was paid upon the supposed valuation at Dublin. After stating the rule given in the text, and which he mentions as having been derived from usages established in England and recognized in judicial decisions there and in Massachusetts, Judge *Sewall* continues: "The effect of this subsequent valuation, in determining the proportion of loss recoverable by the assured in a case of general average, has not been settled, I believe, by any judicial decision; and I have not found any rule or usage respecting a case where the circumstance has occurred of a valuation in adjusting a general average materially varying from the value of the property as insured. The reason may be that the case is very unusual where goods are to be estimated at a very considerable advance and profit, besides the expense of freight, in adjusting a contribution for salvage at their port of discharge; and it may at least be conjectured that never before did a vessel become a third part more valuable in a foreign port, and after a long voyage, than she was in the port from which she sailed, and at the commencement of her voyage; unless by means of some addition and repairs of an extraordinary nature made in the course of the voyage. . . . Nor is a vessel, generally speaking, an article upon which a profit in a foreign market can be insured or expected; nor is it usually sent to a foreign port for sale. It is rather the instrument of trade and business, like a shop or warehouse, than the immediate subject of traffic; and the voyage and employment are ordinarily estimated as a diminution of value to a vessel, and as a matter of expense to the owner, for which he expects an indemnification in the hire or freight, or in the

times in different nations have been intended only to ascertain this value. In practice, if the ship be sold, this is usually taken as fixing her contributory value.<sup>1</sup>

There is no doubt that in most cases it would determine this value with sufficient accuracy; not always, however, for it is obvious that the price might be increased or diminished by extraneous circumstances, which should not be considered in determining the contributory value.<sup>2</sup>

profits accruing from the use of the vessel in the carriage of his own goods. It is perhaps upon these considerations that a variety of positive regulations have been established from time to time in foreign states, as to the *degree* in which a ship shall be liable to contribute in a case of general average. . . . It is the opinion of the court that the defendants are liable in the proportion which the sum underwritten by them upon the vessel bears to the actual value of the vessel when insured; and the valuation stated in the policy is not to be regarded."

The owners of the ship contribute according to her value at the end of the voyage, and according to the net amount of the freight and earnings. 3 Kent, Com. 242; Benecke, Pr. of Indem. 310, 311; Abbott on Ship. 503; 2 Magens, 237; Spafford v. Dodge, 14 Mass. 66, 80; Gillett v. Ellis, 11 Ill. 579. The ship's provisions are not to be added to the value, though the accident happened at a time when much of them remained on board; because they are destined to be consumed during the voyage, and consequently belong to wear and tear. Benecke, Pr. Indem. 311; Brown v. Stapleton, 4 Bing. 119. But in all those cases in which the cargo is obliged to contribute for its value at the time of the accident, without reference to a subsequent diminution, the vessel ought to contribute also for that value, this being the only way of placing all parties upon an equal footing. Ibid.

Where a ship after a jettison is wrecked, but a part of its materials are saved, these contribute according to their value as saved, the expense of salvage being deducted. Dodge v. Union Ins. Co. 17 Mass. 471.

<sup>1</sup> Bell v. Smith, 2 Johns. 98; Lee v. Grinnell, 5 Duer, 400, 429.

<sup>2</sup> Speaking of this rule, Mr. Stevens says: "There is no general rule, however, that will serve for all cases of this nature; for, even on the above principle, if the voyage end at a foreign port, or at a place where there is no demand for shipping, or, on the contrary, where there is a very great demand, the value of the ship will be decreased or increased by such adventitious circumstances, but which ought to have no weight in an equitable apportionment." Stevens & Benecke on Av. (Phil. ed.) 213.

In Gray v. Waln, 2 S. & R. 229, the court say: "The defendant contends that it is the sum the ship would have sold for at Algeiras or Gibraltar, and insists on the impropriety of valuing the goods by one rule and the ship by another. But the same reason does not hold for the valuation of the goods and the ship. The goods are intended to be sold at the port of destination, and, being selected for that market, may be supposed in general to fetch a good price

If the value of the ship when she sails be ascertained, this is certainly a step towards ascertaining her value when the adjustment is made. But it is only a step; for not only is she older, and must have been subject to some wear and tear, but she may be greatly deteriorated in value. There are many rules in the law merchant which seems to be arbitrary, but are in fact founded upon the average of cases, and therefore work well on the whole, although specially adapted to no one case. The rule one third off new for old, in marine insurance, is one of these. In some of our States a rule of like kind has been applied to this question; and one fifth of the value which the ship had when she sailed is deducted to give her contributory value.<sup>1</sup> In other States this rule is not made use of,<sup>2</sup> and even in those States in which it is adopted it would seem not to be applied when the value can be obtained more exactly.

We incline to think that the rule laid down in an interesting case in the United States District Court of New York, may be regarded as giving the present rule of practice. It is substantially this: the value of the ship at the port of departure is to

there. Not so the ship, which in many cases delivers her cargo and returns to the place where the voyage originated, her owners having had no intention to sell her at the port of delivery, which they may have known to be no market for ships. It would seem more just, therefore, to value the ship according to the price she would have borne at the place where the voyage commenced, deducting the expense of carrying her there."

In regard to the deduction mentioned in the last clause, Mr. Phillips observes: "But this is supposing her to come home empty, which by no means is a necessary supposition. 2 Phil. on Ins. § 1383.

<sup>1</sup> *Leavenworth v. Delafield*, 1 Caines, 573; *Gray v. Waln*, 2 S. & R. 229. This is the rule in New York. In *Gray v. Waln* the court said: "I am the more inclined to be satisfied with it, as it is more equitable, more certain, and less liable to accidental fluctuation than the rule contended for by the defendant." But in *Mutual Safety Ins. Co. v. Cargo of the Ship George, Olcott*, Adm. 157, *Betts, J.*, said: "The rule is that a *reasonable* allowance shall be made for wear and tear, and there would manifestly be great expediency in possessing a criterion which should infallibly fix that amount; but without the support of notorious usage and custom to a uniform scale of depreciation of a vessel by performing the whole or any portion of her voyage, it must be sheer conjecture with the court to pronounce the abatement of one fifth, or one half, or any other aliquot of the value of the ship when sound, a reasonable measure of its worth at the time of loss."

<sup>2</sup> It has not been adopted in Massachusetts. *Spafford v. Dodge*, 14 Mass. 66; *Douglas v. Moody*, 9 Mass. 548.

be taken ; from this a reasonable deduction is to be made for wear and tear, and for deterioration in value, and what this deduction should be is to be determined by the best evidence which the case admits.<sup>1</sup> We give in our notes the principal adjudications on this subject.

Where contribution is made to the ship because of damage caused to her for the benefit of the contributory interests, the damage to be contributed for is the actual cost if the repairs are made, or the estimated cost if they are not made.

### B. *Contributory Value of the Freight.*

There is of course no contribution by the freight, unless it be earned, and by only so much as is earned.<sup>2</sup> But the earning of freight is always at a certain cost. The ship is kept in a condition that it may earn freight, and the wear and tear of natural decay of the ship while the freight is being earned, the wages and provisions of the crew, and all expenses attending navigation, are for the most part adjusted as a charge against the contributory value of the freight.

As a matter of principle, the test is this ; so much of the freight as is saved by the sacrifice contributes ;<sup>3</sup> but the expenses sub-

<sup>1</sup> Mutual Safety Insurance Co. v. Cargo of the Ship George, Olcott, Adm. 157.

The adjustment is to be made in the same manner, whether the ship, freight, and cargo belong to the same or to different persons. Spafford v. Dodge, 14 Mass. 66, 79 ; Jumel v. Mar. Ins. Co. 7 Johns. 412, 425.

The contribution is to be adjusted according to the value of the respective articles saved, at the time and in the place when and where the expense was incurred, in like manner as if all the three parties had been present, and each had originally paid his own proportion. Spafford v. Dodge, 14 Mass. 66, 80 ; Douglas v. Moody, 9 Mass. 548, 554.

If the contribution is claimed for goods thrown overboard, or for a mast cut away, the adjustment must necessarily be postponed until the termination of the voyage ; because, until that event, it cannot be known whether anything will be saved from which to claim a contribution, and also because each party will be held to contribute according to the value of what shall come to his hands at the termination of the voyage. Spafford v. Dodge, 14 Mass. 66, 80.

<sup>2</sup> Potter v. Providence Ins. Co. 4 Mason, 298 ; Lee v. Grinnell, 5 Duer, 400, 431 ; Magrath v. Church, 1 Caines, 196, 215.

<sup>3</sup> In Williams v. London Ass. Co. 1 M. & S. 318, a ship was chartered from London to the East Indies, there to deliver her outward cargo and return thence with a cargo for England into the Thames, and there make a true delivery, &c. ;



sequent to the sacrifice, which are necessary to the earning of the freight, are not saved, for they must be incurred at all events. If

and it was agreed that the charterers should, upon condition that the ship performed her voyage and arrived at London, and not otherwise, pay freight for every ton of goods that should be brought home at so much per ton. The ship, in the course of her outward voyage, incurred an average loss, but was repaired and afterwards performed her voyage, and the freight was received. It was held that the freight was liable to contribute to general average, and that the underwriter upon a policy on the ship for the outward voyage was entitled to deduct in respect to this contribution. Lord Ellenborough, C. J., said: "This is the case of an insurance on the outward voyage, on a ship chartered for a voyage out and home; in the course of which outward voyage an average loss has happened; and the question is, whether the freight payable under the charter-party is liable to contribute to general average. It is contended that the whole freight out and home is not liable; but the whole was affected and might have been frustrated by the loss, and was eventually preserved to the owners by the repairs done to the ship. It is true indeed that if this action had been commenced immediately upon the loss happening, it would not have been open to the defendants to say that the plaintiff was recouped in damages by a contribution in respect of freight which at that time was contingent. But the case now before us is argued upon an admission that the freight has actually been received; and therefore now the amount of the damages must be that of the original damage, minus the amount of the plaintiff's contribution; and the difficulty as to the outward and homeward voyage seemed to be removed by the consideration that the whole freight was saved by the repairs." A jettison of the cargo constitutes a general average, to be borne by the ship, freight, and cargo ultimately saved. The Ship Nathaniel Hooper, 3 Sumner, 542, 549. Where an average loss occurred before the vessel sailed, it was held that as the voyage was not commenced, and the loss of freight could not be attributed to the circumstances creating the general average, the freight was neither to contribute nor be contributed for. *Lee v. Grinnell*, 5 Duer, 400, 431. Freight is liable, in some cases at least, upon a chartered ship, to contribute to salvage. *The Racehorse*, 3 Rob. Adm. 101; *Cox v. May*, 4 M. & S. 152, 159; *The Dorothy Foster*, 6 Rob. Adm. 90. General average in this respect is analogous to the case of salvage. The principle upon which freight is to contribute in the case of general average is, that it was one of the things in hazard at the time when that sacrifice which produced the general average was made; and the principle upon which it contributes in the case of salvage is, that but for the recapture, for which the salvage is paid, it would have been lost. *Cox v. May*, 4 M. & S. 152, 159. Where a ship from New York, destined to Madeira, was obliged, being disabled by perils of the sea, to put into Philadelphia, where the cargo was sold, it was held that the freight actually gained or earned in the voyage, and not what the vessel would have earned if she had gone to Madeira, should contribute to an average loss which had been incurred. *Maggrath v. Church*, 1 Caines, 196, 215. If the cargo arrives in safety at the port of destination, the freight is brought into the contribution; but where the voyage is broken up near

a ship makes a sacrifice, and three months afterwards reaches with the saved cargo its port of destination, and thereby earns a freight of ten thousand dollars, all of this is not clear gain. Only that part of it is so which is over and above the necessary cost, subsequent to the sacrifice, of earning this freight.

The extreme difficulty of applying this rule in detail, — that is to say, of estimating exactly what share of these expenses should go in diminution of freight, — has led in this case, as in many others in the law of insurance, to which we have referred, to the adoption of a practical rule founded on the average of cases.

In New York the freight contributes on one half of the gross amount earned,<sup>1</sup> considering the one half as expended in earning this half. This, however, is a larger allowance than is usually made. The prevailing rule in this country is to apportion the general average of contribution on two thirds of the gross amount of freight earned.<sup>2</sup>

It is said that in England only the wages are deducted.<sup>3</sup> Where any rule on this point exists, we suppose it to be applicable to all cases of freight saved and earned. It was held in one case in

the port of departure, and the vessel has not adopted any intermediate port, as and for the port of destination, but has returned home, and the freight has not been saved by the jettison, the contribution to the general average loss should be between the ship and the cargo. *Tudor v. Macomber*, 14 Pick. 34, 39.

<sup>1</sup> *Leavenworth v. Delafield*, 1 Caines, 573; *Heyliger v. N. Y. Ins. Co.* 11 Johns. 85. In *Leavenworth v. Delafield*, the court observes that this rule may be deemed arbitrary, but that it will, perhaps, come as near as any other to producing a contribution in proportion to the real interest of each which may be in jeopardy, inasmuch as the freight will not clear to the owner more than, if as much as, one half what is contracted to be paid. This is also the rule in France, and in regard to it Pothier remarks: "As the freight is only due to the owner of a vessel, as a kind of indemnity for her deterioration and expenses incurred by the voyage, it is subjecting him to a double burden to make him contribute for the entire value of the vessel and of the freight. Our ordinance, therefore, has adopted the middle course of making him contribute for one half of the value of each." Pothier's *Maritime Contracts*, vol. 2, n. 119, p. 411.

<sup>2</sup> *Humphreys v. Union Ins. Co.* 3 Mason, 429, 439. In *Mutual Safety Ins. Co. v. Cargo of The Ship George, Olcott*, Adm. 157, it was held that the freight should contribute at its gross value, deducting therefrom all necessary expenses incurred, if any, subsequent to the wreck.

<sup>3</sup> *Marshall on Ins.* 467. It is the same in the *Consolato del Mare*, and the Ordinances of Philip II., Genoa, Konigsburg, Hamburg, and Copenhagen. See *Stevens & Benecke on Average*, 215, 217.

Massachusetts that this rule did not apply to cases of capture and subsequent release,<sup>1</sup> but this decision was not long after overruled.<sup>2</sup>

If the voyage has many parts, that is, if the ship carries cargo to many ports, and earns freight at each port, the question has arisen whether, in the adjustment, the freight held to be contributory should be only that to the first port that the vessel reaches after the sacrifice, or the whole freight to the end of the voyage. The circumstances of such cases vary so much as to make it difficult to give a certain rule. If, however, the freight to the end of the whole voyage is certainly that which is saved by the sacrifice, it would be difficult to see why this whole freight should not contribute. If the vessel was chartered for the whole voyage, and, by the terms of the charter, one whole freight was payable at the end of the whole voyage and nothing before, this would seem to strengthen the reason for saying that the whole freight should contribute.<sup>3</sup>

<sup>1</sup> Douglas v. Moody, 9 Mass. 548.

<sup>2</sup> Spafford v. Dodge, 14 Mass. 66, 81.

<sup>3</sup> If there is a charter-party, and freight is to be paid for the round voyage out and home, and the principal object of the voyage is to obtain a return cargo, if a loss occurs on the outward voyage, the freight for the round voyage contributes. The Brig Mary, 1 Sprague, 17. In Williams v. London Ass. Co. 1 M. & S. 318, of which we have given a statement, *supra*, p. 449, n. 3, Bayley, J. said: "Here the plaintiff had a vested right of freight; he had some freight then actually due, and the whole was put in hazard, and the whole has been ultimately earned. The difficulty raised in argument is this, that a thing is not to contribute unless ultimately saved, and that it was uncertain at the termination of the outward voyage whether the freight would be saved; but this freight was one entire and indivisible sum payable for the use of the ship out and home; therefore, when ultimately earned, having been put in hazard and saved, it ought to contribute." Benecke, however, criticises the decision in this case. He says: "It is, however, with all deference, my private opinion that, in cases of this description, the freight ought to be divided, notwithstanding the stipulation in the charter-party, and such part only ought to contribute as may fairly be presumed to belong to the outward voyage. Considering, in the first place, the liability of contributing towards a general average as between the owners of the ship and those of the cargo, without reference to a particular stipulation exempting the cargo from contribution, it is not difficult to see that, if the freight were not to contribute at all, the ship-owner would gain the chance of earning freight at the expense of the proprietors of the cargo; and that, on the other hand, if the whole of the freight for the voyage out and home were made to contribute, the freight would run the double risk of a general average, while that of the cargo were only

But if the ship, on its arrival at a certain port, delivers there a part of the saved cargo, and receives its freight for that part, and then carries forward the remainder of the saved cargo, and on her arrival receives freight for this remainder, it is difficult to see why the freight to the last port is not as much saved by the sacrifice as the freight to the first port; or why, if so saved, it should not contribute.

If the vessel on arriving at the first port delivers there the whole of the saved cargo, and is paid for it, and takes there a new cargo for another port, it is a different case. Even here it might be said, that if the ship be enabled by the sacrifice to earn this second freight, this second freight should not be a contributory interest. We think it more reasonable, however, to say that, so far as the freight is concerned, if not in all respects, the voyage ends when the whole cargo is delivered. Of course no freight earned previously to the sacrifice contributes, because it is not saved thereby.<sup>1</sup> Where the ship is disabled in the course of the voyage, and the master is able to discharge his duty of sending the cargo to its

single; for the risk of a general average taking place upon the voyage out and home is double that of the same event occurring upon a single voyage. Had the vessel in the above case incurred another general average upon her voyage home, the whole freight for the voyage out and home would, according to the same principle, have been liable to contribute to this also, whilst the outward-bound cargo only would have contributed to the first, and the homeward-bound cargo only to the second general average." Benecke, *Pr. of Indem*, 315; *Stevens & Benecke on Average*, 258.

The court, in giving salvage upon freight, makes no separation as to minute portions of the voyage. If a commencement has taken place, and the voyage is afterwards accomplished, the whole freight is included in the valuation of the property on which the salvage is given. *The Dorothy Foster*, 6 Rob. Adm. 88, 91. In *The Progress*, 1 Edw. Adm. 210, 224, the court say: "If there had been two distinct voyages, as is sometimes the case in charter-parties, distinguishing the outward from the homeward voyage, the case would have assumed a different aspect; but where a ship goes out under a charter-party to proceed to her port of destination in ballast, and to receive her freight only upon her return, the court is not in the habit of dividing the salvage." These decisions as to salvage would apply as well to general average, as the two are, in respect to the contribution of the freight, analogous. *Cox v. May*, 4 M. & S. 152, 159.

<sup>1</sup> *Spafford v. Dodge*, 14 Mass. 66, 80; *Dunham v. Com. Ins. Co.* 11 Johns. 315. See further as to contribution by freight, *Da Costa v. Newnham*, 2 T. R. 407, 415; *Padelford v. Boardman*, 4 Mass. 548; *Col. Ins. Co. v. Ashby*, 13 Pet. 331, 344.

destination in another ship, the freight which is saved is the excess of what is earned over the cost of transshipment.<sup>1</sup>

If, by the terms of a charter-party, freight paid in advance is to be kept by the owner of the ship, whether the vessel arrives at her port of destination or not, the charterer and not the ship-owner is liable to contribute to the general average in respect of the freight advanced.<sup>2</sup>

C. *What Goods are held by the Adjustment to contribute, and at what Value.*

Much question has been made as to what property contributes to general average, as a part of the cargo. The rule laid down by Magens is, that what pays no freight pays no average.<sup>3</sup> But we agree with Mr. Stevens, that this is an insufficient and unreasonable rule.<sup>4</sup> Lord Tenterden says that all articles should contribute which are carried in the ship for the purpose of traffic, whether they belong "to merchants, to passengers, to the owner, or to the master."<sup>5</sup> And Lord Ellenborough also makes this purpose of traffic the test of the contributory interest.<sup>6</sup> Benecke and Emerigon apply a different test; they hold that whatever should be contributed for, if jettisoned, should contribute if saved; and on this ground say that the trunks and luggage of passengers should contribute.<sup>7</sup> All this may be defended on principle, and it seems

<sup>1</sup> *Dodge v. Union Ins. Co.* 17 Mass. 470, 478. In this case a vessel, on a voyage from Siam to Amsterdam, sprung a leak, and put into the Isle of France in distress, where she was totally lost. The cargo was sent forward to Amsterdam in a Dutch ship. In an action for general average for the expenses incurred at the Isle of France, the court decided that among the contributory interests was the freight from Siam to Amsterdam, deducting what was paid to the Dutch ship. See also *Searle v. Scovell*, 4 Johns. Ch. 218.

<sup>2</sup> *Trayes v. Worms*, C. P. 1865, 12 Law T., n. s. 547.

<sup>3</sup> 1 Magens, 62.

<sup>4</sup> Mr. Stevens says that this rule should not be construed literally, for it would be very unjust that the master or owner, or any other person who had goods on board, should not contribute merely because he paid no freight for the carriage of them; but all the goods on board ought to contribute, and the goods are the wares or cargo for sale laden on board the ship, whether it pays freight or not. *Stevens & Benecke on Av.* p. 206.

<sup>5</sup> *Abbott on Shipping*, 502.

<sup>6</sup> *Hill v. Patten*, 8 East, 373, 375.

<sup>7</sup> Benecke, *Pr. of Indem.* 308; Emerigon, *Traité des Assurances*, ch. 12, § 42, p. 645.

that the Roman law included all goods on board of any kind.<sup>1</sup> But by the general and we think uniform practice, the baggage of passengers of every kind does not contribute.<sup>2</sup>

In an English case, the question whether provisions for passengers should contribute was considered.<sup>3</sup> It was a convict ship, and the value of the stores and provisions put on board by government for the convicts was very large. But it was held by all the judges of the Common Pleas, that they should not contribute. The reasons offered by the counsel for the plaintiff, and by the court in their decision, cover the whole ground; the counsel resting his claim on the assertion that the provisions in this case were a cargo, and the court denying the claim of the plaintiffs, on the

<sup>1</sup> Digest, 14, 2, 2, 2. See also 2 Molloy, ch. 6, § 14.

<sup>2</sup> Magens says that he does not remember ever to have met with any regulation of a general average where the apparel and jewels of passengers were brought into the contribution. 1 Mag. 62. See also Abbott on Shipping, 503; Stevens & Benecke on Av. (Phil. ed.) 206, 251; 2 Phil. on Ins. § 1394; Valin, Ord. de la Mar. tom. 2, l. 3. tit. 8, art. 11. Emerigon, though maintaining the principle that the trunks and luggage of passengers should contribute, says that he has never known an instance where this has been put in practice. Tom. 1, p. 645.

<sup>3</sup> *Brown v. Stapleton*, 4 Bing. 119. In this case the counsel argued, that, in a ship hired to carry convicts, the convicts were themselves the cargo, and not like passengers in ordinary cases; that the provisions and convicts were in effect the *merces* of the voyage, and, therefore, distinguishable from the case where the provisions are for a few passengers, and of small comparative value. In giving the opinion of the court, *Best, C. J.*, said: "It is not every object of value which has been held liable to a contribution for average, but only such stores as are termed *merces*. *Merces* has never been held to extend to provisions, but includes only the cargo put on board for the purposes of commerce; and the practice shows that this has been the understanding of all times. Magens, Molloy, Beawes, Stevens, and other writers, all expound the word *merces* in this way; all in terms exclude provisions. They concur in saying that things of light weight, but of considerable value, must contribute, if they belong to the cargo, but not if they belong to the passengers. Provisions are laid in for the passengers, and must be esteemed to belong to them. Further than this, the ship is always brought into average according to her reduced value at the end of the voyage, when the provisions have mostly been consumed. As to the argument that the convicts must be esteemed the *merces* upon this voyage, and so the stores laid in for them be chargeable as parcel of the *merces*, it is clear that, whether cargo or not, they cannot be brought into contribution, because human life is not the subject of average. If, therefore, the convicts themselves cannot be brought into contribution, much less can the provisions, which are merely accidental to their passage."

ground of the custom, which, as they say, limits the contributory liability to merchandise.<sup>1</sup> We believe this to be the law in England, and the practice there and here.

The mere size or bulk of the goods does not enter into this question. It is always said that the precious metals and precious stones, and other small articles of great value, contribute.<sup>2</sup> Mr. Arnould says of these things that they contribute, "unless carried

<sup>1</sup> Neither passengers nor crew are called on to contribute for their personal safety. Dig. 14, 2, 2, 2; Guidon, ch. 5, art. 26; Cleirac, p. 45; Emerigon, ch. 12, § 42, § 8 (Meredith's ed.) 495; *Brown v. Stapyleton*, 4 Bing. 119; *Weston v. Train*, 2 Curtis, C. C. 49, 59. Neither do the wages of mariners contribute. Pothier on Maritime Contracts (Cushing's ed.), p. 72, n. 126; Emerigon, ch. 12, § 42, § 7 (Meredith's ed.) 494; Consolato del Mare, c. 281, 293.

In *Utpadel v. Fears*, 1 Sprague, 559, it was held that the shares of fishermen in mackerel voyages, where by the articles the fish taken are delivered to the owner and by him sold on joint account, are subject to contribution in general average. *Sprague, J.*, while admitting that seamen's wages are not liable, says that the reasons given for the rule are not satisfactory.

<sup>2</sup> *Park on Ins.* (8th ed.) 296; *Millar on Ins.* 344, 345; *Weeskett on Ins.* 130, 131; Dig. 14, 2, 2, 2; *Nelson v. Belmont*, 5 Duer, 310; *Peters v. Milligan*, before Mr. Justice *Buller*, Sittings at Guildhall after Mich. 1787, cited in *Park on Ins.* 296; 1 *Magens*, 62; 1 *Emerigon*, 639; *Bevan v. Bank of U. S. 4 Whart.* 301, *infra*, p. 463, n. 3. *Emerigon*, p. 639, states very succinctly the reason of the rule: "The more valuable a thing is, the more it is for the interest of the owner that the ship in which it is should not perish"; and *Magens* says that it is customary in London, and most other countries, for the proprietors of whatever gold, silver, or jewels pay freight in merchant ships to contribute to a jettison for their full value; for, the masters being obliged, by all sea laws, to throw out, in case of need, what is heaviest and of least value, and the worth of such precious commodities being known, the care of them will be increased in proportion to their worth, to prevent their being thrown overboard promiscuously with other things; and hence their preservation redounds to the common benefit. *Mag.* 63. In *Bevan v. Bank of U. S.* the court says: "In case of a general average, on account of part of the cargo being ejected for the purpose of saving the ship and residue of the cargo, the owners of specie, diamonds, or precious stones are required for having such preference allowed to them, in the retainer of their portion of the cargo on board, to contribute towards making good the loss sustained by those whose goods are ejected, according to the value of the specie, &c., and not according to their weight or bulk, which, being of but small account, would not have tended to preserve the vessel and remaining part of the cargo, even if they had been thrown overboard." Lord *Kames*, however, in his work on the Principles of Equity, p. 116, while admitting this to be the rule, controverts its propriety, and maintains that the contribution should be according to weight, and not value.

about the person or forming part of the wearing apparel.”<sup>1</sup> It is difficult to see why the same thing should contribute if carried in a trunk, and not contribute if carried in the pocket.<sup>2</sup> It is however true that, in the English case above referred to,<sup>3</sup> merchandise is said to include all articles of great value not carried on the person. The same distinction would apply, we think, to bank-bills. They should not contribute unless they are merchandise, which they seldom or never are.<sup>4</sup> We agree with Mr. Phillips, that they should not contribute, but not altogether for the reason that he gives,<sup>5</sup> — that they are not so properly actual property as the evidence of demands which may be supplied by other evidence if they are lost.

One important exception to the rule, that only those goods contribute which are contributed for, occurs in the case of goods carried on deck. We have seen, by the general rule, that they are not contributed for, but they always contribute. We know but one decision to this effect,<sup>6</sup> but the practice is uniform.

<sup>1</sup> 2 Arnould on Ins. 919. All property on board the vessel at the time of the jettison, and saved, unless attached to the persons of the passengers, is to be brought into contribution. *Harris v. Moody*, 30 N. Y. 266.

<sup>2</sup> Magens appears to make no distinction between valuables carried in the trunk or about the person of the passenger; for he says that in voyages from Cadiz and Lisbon, where the carriage of gold and silver makes a great part of the ship's profit, or freight, if a person, under the cloak of going passenger, should conceal, either in his trunks or about his body, any such considerable sum of money, or jewels, as would not be suffered without paying a freight, he must, when discovered, not only satisfy the freight, but also contribute to any jettison. 1 Mag. 63.

<sup>3</sup> *Brown v. Stapleton*, 4 Bing. 121.

<sup>4</sup> *Weskett*, tit. Contribution, n. 15, citing 2 Valin's Com. 200, classes bills with money, jewels, &c., as articles that ought to contribute. But in the case of *The Emblem*, Daveis, 61, it was held that bills of exchange, saved from a wreck, were not liable for salvage, from which it would follow that they would not be bound to contribute in general average. In *Harris v. Moody*, 4 Bosw. 210, 30 N. Y. 266, it was held that bank-bills of individuals, so carried for them in a crate, by an express company, which company, by an agreement with the owners of the steamboat, pay such owners a fixed sum annually for the carrying of a stated number of portable crates, with the contents thereof, are bound, when saved, to contribute in general average.

<sup>5</sup> 2 Phil. on Ins. § 1397.

<sup>6</sup> *Emerigon*, ch. 12, § 42, p. 639; *Code de Com.* l. 2, tit. 12, du Jet. a. 232; *Consolato del Mare*, art. 13, tit. du Jet. c. 183; *Stevens & Benecke on Av.* (Phil. ed.) 210, 248. Goods carried on deck, according to the custom of the



We do not consider that the question, whether public property is exempt from contribution in an adjustment of average, has been positively determined by direct adjudication. There would seem to be no good reason for this exemption.<sup>1</sup> In one American case, the court were of opinion that public property could claim no exemption from contribution, and that the right of the master to retain the goods until the contribution was paid extended to public property.<sup>2</sup> In the English case just above referred

trade, by steamboats navigating Long Island Sound, and stowed in the usual way, are liable to contribute by way of general average for a loss occasioned by a jettison of other goods necessarily thrown overboard under stress of weather and while subjected to the perils of the sea. *Harris v. Moody*, *supra*.

<sup>1</sup> 1 *Magens*, 63, 172; *Us et Costumes de la Mer*, 20; *Jug. d'Oleron*, c. 8, n. 8. *Magens* says the reason is that, "in goods belonging to his Majesty, all his subjects in general are concerned; wherefore for any particular loss of them no particular contribution is necessary, because it is supplied by the general contribution of the whole community." But *Valin*, tom. 2, p. 184, tit. des Av. a. 11, n., thinks there is no reason for this.

<sup>2</sup> *United States v. Wilder*, 3 *Sumner*, 308. This was an action of trover brought by the government to recover certain property detained by the defendant. The facts were the following: The schooner *Jasper*, from Boston to New York, went ashore on Block Island. Much expense was incurred in saving the goods, which gave rise to a claim of general average. Among the property on board there were about one hundred bales of slop clothing belonging to the United States, invoiced at \$7,320. The goods being brought back to Boston, the owners of the vessel made out an average bond for the freighters to sign. The storekeeper of the United States (by whom the clothing was shipped) declined to sign the bond, claiming for the United States the right to take the goods, without paying or securing their contribution to the average. This right being denied by the ship-owners, they refused to deliver the clothing, and this action was brought to recover its value. The case was tried before Mr. Justice *Story*, from whose opinion we make the following extracts: "The sole question in the present case is, whether there exists a right of lien for the general average due on the goods (slop clothing) belonging to the United States, under the circumstances stated by the parties. There is no dispute that there has been a general average in this case, towards which all the goods on board, and among others the slop clothing of the United States, are to contribute. There is as little doubt that for such general average there does exist, on the part of the master and owners of the schooner *Jasper*, a right of lien against all the goods belonging to all the other shippers, except the United States. In other words, that the master and owners of the schooner have a right to retain all the goods of such shippers until their proper share of contribution towards the general average is either paid or satisfactorily secured to be paid. . . . The question then is, whether a like lien exists in regard to goods belonging to the United States. No case has been cited

to,<sup>1</sup> provisions put on board by the government, and belonging

in which any exception has ever been made in regard to the United States, nor has any authority been produced to show that it constitutes a known prerogative of any other government or sovereignty. I have examined the treatises upon the prerogatives of the crown of England, and I do not find there, or in any of the great abridgments of the law under the title prerogative, any such exception recognized or even alluded to. The argument rests the objection upon the ground of public inconvenience, if it should be held that, whenever a lien exists against a private person, it is to be held that the like lien attaches against the United States. And it is said that in cases of contract for labor and services, or repairs, or supplies with the United States, no lien can be presumed to exist; but that the only remedy is an appeal, not to law, but to the justice of the government. . . . The present case is not one arising under contract, but by operation of law, and, if I may so say, *in invitum*. It is a case of general average where, as in a case of salvage, the right of the party arises from sacrifices made for the common benefit, or labor and services performed for the common safety. Under such circumstances the general maritime law enforces a contribution, independent of any notion of contract, upon the ground of justice and equity, according to the maxim, *qui sentit commodum, sentire debet et onus*. And it gives a lien *in rem* for the contribution, not as the only remedy, but as in many cases the best remedy, and in some cases the only remedy; as, for example, where the owner of the goods is unknown. Indeed, it may be asserted with entire confidence, that, in a great variety of cases, without such a lien, the ship-owner would be without any adequate redress, and would encounter most perilous responsibility. . . . It is said that, in cases where the United States are a party, no remedy by suit lies against them for the contribution; and hence the conclusion is deduced that there can be no remedy *in rem*. Now, I confess that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States in its sovereign capacity would seem to furnish the strongest ground why the remedy *in rem* should be held to exist. And I do not well see how otherwise it would be practicable at all, or, if practicable, how without extreme peril to the ship-owner any private ascertainment or settlement of the general average could be made at all. The United States would not be bound by any such ascertainment or settlement of the average. They might deny the correctness of the valuation and apportionment; there would be no remedy to compel a submission to the authority of any tribunal of justice; and whether the ship-owner should ever receive any compensation or not, and what compensation, would depend upon the good-will of Congress after what is a most lamentable defect in the existing state of things, a protracted appeal, and after many years' duration of unsuccessful and urgent solicitations to that body. And yet the contribution of every other shipper may be, and indeed must be, materially dependent upon what is properly due and payable by the United States. In the case of mere private shipments, a court of equity (and probably a court of admiralty also, by a proceeding *in rem*) would have ample jurisdiction

<sup>1</sup> Brown v. Stapleton, 4 Bing. 119.

to them, were held not to contribute. But the reasons given for this at much length include no reference to the fact that they were public property. To this extent, therefore, this case may be considered as denying by implication any exemption on that ground.<sup>1</sup>

It is the general rule of all contributory maritime interests, that their contributory value in adjustment is that which they have at the time and place where they are considered as finally saved.<sup>2</sup> So

to compel a reluctant shipper to submit to its jurisdiction, in ascertaining and decreeing an apportionment of the contribution to be made by all the shippers. I cannot therefore but think that the circumstance that the United States can in no other way be compelled to make a just contribution of its share in the general average, so far from constituting a ground to displace the lien created by the maritime law, does in fact furnish a strong reason for enforcing it. . . . Finding therefore no such exemption from the ordinary lien for general average as the government seeks to sustain justified by any general principle or any authority, I am not bold enough to create one. The consequence is, in my opinion, that the present suit is not maintainable, and that judgment ought to be entered for the defendant."

<sup>1</sup> The question of enforcing a lien on government property by process *in rem* was discussed with great learning and ability by Mr. Justice Gray in *Briggs v. Light-Boats*, 11 Allen, 157; and the opinion expressed that the action would not lie. This was a suit to enforce a State lien for building light-boats for the United States. See also *Hill v. Mitchell*, 25 Ga. 704; *Dufolt v. Gorman*, 1 Minn. 301. In *Briggs v. Light-Boats*, *supra*, it is said that, in the case of *United States v. Wilder*, the government was not in possession of the clothing, and no suit in which the United States were a party defendant at law or in equity, or claimant in admiralty, had been brought; and that the only point decided was that the owners of the ship, whose duty it was to adjust the general average, were not bound, without receiving a contribution to the average loss, to surrender the clothing to the United States, and thus postpone the whole adjustment until after an opportunity to apply to Congress. We doubt, however, whether the two cases can thus be reconciled. The reasoning of Mr. Justice Gray seems conclusively to settle the point that no suit *in rem* can be brought against government property, and no suit at common law, in equity or admiralty, against the government. The same reasoning seems to lead to the conclusion that the government should not be deprived of its property. Nor are we able to see why the owner of the vessel cannot make the adjustment in the same manner as if the goods belonged to a private person. The lien which he has in the latter case is not for the purpose of making the adjustment but for settling it.

<sup>2</sup> 2 Arnould, Ins. 932; 2 Phillips, Ins. § 1401; *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1, 11. When the general contribution is for disbursements, the goods ought to contribute according to their value at the time when the disbursements were made, and without reference to a subsequent deterioration. *Benecke, Pr. of Indem.* 298; *Douglas v. Moody*, 9 Mass. 548, 554.

far as the goods are concerned, this value is ascertainable in many ways. They may be sold at the place where saved, and their net proceeds then determine their contributory value.<sup>1</sup> If they are not sold, there may be a known market value, and upon this is founded their contributory value. In the absence of these tests, the invoice value is the foundation of the estimate, and this invoice value is generally taken for this purpose whenever the average is adjusted at some other port than the port of destination.<sup>2</sup> If this

If the vessel arrives at the home port, or if it is wrecked, and the goods are sent on, the general rule is that they shall contribute according to their value there. *Barnard v. Adams*, 10 How. 270, 307. In this case the court said: "The place where average shall be stated is always dependent more or less on accidental circumstances, affecting not the technical termination of the voyage, but the actual and practical closing of the adventure. We see nothing in the circumstances to take this case out of the general rule that contribution should be assessed on the value at the home port." See also *Gillett v. Ellis*, 11 Ill. 579; *Gray v. Waln*, 2 S. & R. 229.

<sup>1</sup> See *Stevens & Benecke on Av.* (Phil. ed.) 68-74, 193, 194; 2 Phil. on Ins. § 1401; *Dodge v. Union Ins. Co.* 17 Mass. 470, 478; *Tudor v. Macomber*, 14 Pick. 34. In *Lee v. Grinnell*, 5 Duer, 400, 430, where the cargo was damaged while in port and sold, it was held that the amount it brought at the sale was to be taken as the fair value. In *Richardson v. Nourse*, 3 B. & Ald. 237, goods were sold at an intermediate port, in order to pay for necessary repairs, at a price higher than they would have brought at the port of destination. A reference being had to settle the loss, the arbitrators (who were mercantile men) allowed for the actual value of the goods when sold, and not for their value at the port of destination. The case came before the court on a motion to set aside the award. It was held that, as it did not clearly appear that the award was contrary to any well-established principle of law, it must stand. Mr. Phillips says: "There is a diversity of opinion on this question among practical underwriters in the United States." *Stevens & Benecke on Av.* (Phil. ed.) 194. We believe that adjusters in this country, where there is a *bonâ fide* sale of goods, take the net proceeds as determining the contributory value.

<sup>2</sup> *Tudor v. Macomber*, 14 Pick. 34, 38. If the policy should contain a less valuation than the invoice, it should be opened, just as it would be in respect to the ship, to ascertain the true or invoice value. *Ibid.*

An average loss opens a valued policy. *Le Cras v. Hughes*, 3 Doug. 81.

Where goods insured by a valued policy are jettisoned for the common benefit, the underwriters are liable for the amount at which the goods are valued in the policy, although it exceed their market value at the place of destination. *Forbes v. Manufacturers' Ins. Co.* 1 Gray, 371.

In New York the value of the goods is taken to be the first cost at the port of departure and charges. *Leavenworth v. Delafield*, 1 Caines, 573. In this case *Livingston, J.* said: "It will be a rule less liable to objection, will suit the

invoice price does not include commissions and premium of insurance, these should be added.<sup>1</sup>

The two elements which enter into the estimate of the contributory value of goods for adjustment are, first, only the value saved contributes, and next, only so much of that value as was at risk at the time of the sacrifice. Hence, as we have seen in relation to freight, whatever charges, losses, or expenses occur subsequently to the sacrifice, in reference to the goods saved, before it is finally saved, diminish its value just so much. Therefore from the proceeds, if sold, freight, duties, and commissions, and all other expenses necessary to realize the value of the goods, are deducted.<sup>2</sup>

The sending of goods to a port is always with the belief that the increase of value by carriage there will more than meet the expenses of freight and carriage. In practice it is often assumed, neither party objecting, as he might have the right to, that these expenses meet this increased value and no more. Then the value of the goods remains the same as their original value, which is determined by the invoice, and hence the invoice price is taken as their contributory value.<sup>3</sup>

greatest number of cases, and not be affected by the fluctuations of markets or other contingencies, and certainly most easy of practice, always to value the goods at the invoice price, that is, at their first cost, without regard to their price abroad." See also *Mutual Safety Ins. Co. v. Cargo of Ship George, Olcott*, Adm. 157, 166. In *Spafford v. Dodge*, 14 Mass. 66, it was held that the value of the goods at the port of lading was to be taken, unless it should appear that the value was increased by being carried to the port where the average expense became necessary.

<sup>1</sup> *Usher v. Noble*, 12 East, 639.

<sup>2</sup> *Benecke, Pr. of Indem.* 301; *Dodge v. Union Ins. Co.* 17 Mass. 470, 478.

<sup>3</sup> In *Douglas v. Moody*, 9 Mass. 548, a neutral hired and loaded a vessel for a voyage, in the course of which she was captured on suspicion of having enemies' property on board, and carried into port and libelled as prize; but before any proceedings in the admiralty a compromise was effected between the captors and the hirer, who was owner of the cargo; on which, for the release of the vessel and cargo, the latter drew a bill of exchange, which the master indorsed, he having been appointed by the owners of the vessel; and in consideration thereof the vessel and cargo were released, and arrived in safety. It was held that, on payment of the bill of exchange, the owners were liable therefor to the hirer, as for an average on the value of the vessel and cargo at the time and place of incurring the expense. In regard to the adjustment, the court said: "The question, as it

We see no sufficient reason for saying, with Mr. Benecke<sup>1</sup> that freight advanced by the shipper should be included in the contributory value of his goods, when the adjustment is made at the port of departure. It is only an unusual stipulation as to the time of the payment of freight, and we know not why it should affect the rights or obligations of the parties as to contribution, especially where the freight is to be recovered back, if not subsequently earned, as must usually be the case.<sup>2</sup>

In one American case there seems to be an exception to the rule that goods are not liable to contribution unless they are at risk when the sacrifice is made. The peculiar circumstances of the case may, perhaps, justify the decision.<sup>3</sup> We cannot doubt, however, that the rule itself is, very nearly at least, universal.

occurred at the trial in assessing the damages, supposing the plaintiff entitled to recover, respects more particularly the hire and freight. The same sum is freight as connected with the cargo, and hire as money due to the defendants. If the value of the cargo is to be increased by adding to it this sum as freight saved by its arrival at the place of destination, and its increased value in the market there, there seems to be an equal reason for adding it as hire to the value of the vessel; because the hire becomes due to the owners of the vessel in consequence of her arrival. It may be said that the hire is subject to great deductions for wages and provisions, and is not a net gain or acquisition to the defendants. But the addition of a freight to the value of the cargo may be liable to similar objections. And it seems, upon the whole, to be most reasonable, and most consonant to the rules of contribution as observed in English decisions, to estimate the vessel and cargo at their value in the place and at the time where and when the expense was incurred, which is to be adjusted by the respective owners according to their average proportions."

<sup>1</sup> Stevens and Benecke on Av. (Phil. ed.) 257.

<sup>2</sup> In *Winter v. Haldiman*, 2 B. & Ad. 649, it was held that even such an advance did not constitute a part of the amount of insurable interest in the adjustment of a total loss. 2 Phil. on Ins. § 1404.

<sup>3</sup> *Bevan v. Bank of the United States*, 4 Whart. 301. In this case a quantity of specie, the property of the defendants, was shipped, together with other goods, on a voyage from New Orleans to Philadelphia. The vessel became ice-bound in Delaware Bay, and was in imminent danger of being wrecked. The specie was taken out, and conveyed by land to Philadelphia, where it was delivered to the defendants on payment of freight. Eight weeks afterwards the vessel arrived in safety with the remainder of her cargo, which had been in whole or in part discharged into lighters, and afterwards reshipped. A number of additional charges had also been incurred in the mean time for the safety of the ship and cargo. It was held that the defendants were bound to pay their proportion of these expenses. The grounds of this decision appear from the following extracts

## SECTION XX.

## OF THE FORCE AND EFFECT OF AN ADJUSTMENT.

We cannot doubt that the general rule is, in this country, that an adjustment made in good faith, and a full knowledge of all the material facts of the case, is binding upon the parties. It may be, however, doubted whether it is not otherwise in England.<sup>1</sup> We are not, however, satisfied by the cases to which Mr. Arnould

from the opinion of the court: "Suppose, for example, that a vessel, with a cargo of the same kind of goods throughout on board, belonging to twenty different owners, each owning an equal quantity, is run on shore within eight or nine miles of the port of destination, for the purpose of saving her and her cargo from an impending danger, when it becomes requisite to unlade the vessel, and to convey the cargo thence by wagons to the place of delivery, in doing of which two months are consumed, it is obvious that, according to the principle contended for on behalf of the defendants, the owner whose goods are first taken out of the vessel and conveyed immediately to him will have comparatively but little of the whole expense to pay, whereas he who receives his goods last will have perhaps more than twenty times as much to pay as the first. The charges being made general average as to the first who receives his goods down to the time of their being delivered to him, the last has to pay one twentieth part of these charges, and upon the same principle one nineteenth of the expenses attending the saving and delivery of the goods to the second, and so on till his own turn comes, when he has to pay all the expenses of saving his own portion of the cargo. . . . This rule would subject those whose goods are saved and delivered last to the payment of a portion of the expenses incurred in saving those of the first, without requiring the first to pay any part of the expenses incurred in saving the goods of the last, but leaving them to pay the whole of it themselves. . . . The property of the defendants and that of the plaintiffs formed, as it were, a common stock of a sea venture held by them in their several proportions as partners, and all were alike exposed to the same common danger from which the stock belonging to the defendants was saved, and a proportionable part of the expense incurred by saving it paid by the plaintiffs; and why shall the latter not receive from the former a proportionable part of the expense incurred in saving their portion of the stock from the same common danger? Natural justice seems to require that they should." Benecke maintains the same principle as to goods shipped into barges for the purpose of lightening and saving the vessel and the remaining cargo, but adds that, as to goods taken from the vessel for the convenience and at the peril of their owners, all connection between them and the vessel and remaining cargo ceases from the moment of the unloading, and a subsequent general average falls entirely upon the vessel, the goods remaining on board, and the freight for the same. Benecke, *Pr. of Indem.* 306, 307.

<sup>1</sup> *Shepherd v. Chewter*, 1 Camp. 274, 276.

refers, or any others that we have been able to find, that an agreed adjustment in England is entirely devoid of final authority. We believe that the interests of commerce, and the purpose and principles of the law of insurance, require that such an adjustment should be held to be conclusive against all parties, with only the exceptions above stated, of fraud or mistake.

It seldom happens that an adjustment of general average does not include items of partial loss, because the adjustment covers the whole loss. Of course the adjuster will carefully discriminate these, and apportion them upon the interest or interests to which they belong. The necessity and the custom of doing this has probably helped to make the phrase "particular average" synonymous or nearly so, in the law of insurance, with "partial loss."

We have already seen that expenses may be incurred for the benefit of one interest only, and should then be charged to that interest; or for the benefit of more than one, and should be charged accordingly. So they may be incurred for the benefit of all the interests, and will then be chargeable to all, and will be distributable among them all in the same manner, or in the same proportions, as if they were general average expenses. Whether the adjuster called them in this case general average charges or not, would be unimportant, so far as the owners and shippers were concerned. But it might be important for the insurers, as the policy might make them liable only for general average charges, or might exclude that liability. It would be giving quite too much force to an adjustment to say that the name given to these charges by an adjuster could affect the rights or obligations of the insurers or insured, for these must depend upon the actual character of the charges.

## SECTION XXI.

### OF A FOREIGN ADJUSTMENT.

The proper place for the making of an adjustment is the home port, or the port of final destination.<sup>1</sup> It is, however, obvious that there may be good reasons for making the adjustment at another port. An owner, for example, of cargo lost by jettison

<sup>1</sup> Stevens & Benecke on Av. (Phil. ed.) 268; *Simonds v. White*, 2 B. & C. 805, 811, 4 D. & R. 375, 385; *Thornton v. U. S. Ins. Co.* 3 Fairf. 150, 153.



has at once a lien on all the contributory interests and property for his indemnity.<sup>1</sup> If the ship now makes a port at which it delivers a part of the contributory cargo, and then goes to another port to deliver another part, and the shipper having a claim for contribution is obliged to delay adjusting his claim until the ship reaches her port of final destination, he may lose thereby all power of enforcing this claim, or recovering his indemnity. There would be no remedy for this, excepting to make at an earlier port the adjustment as to the parties whose goods were deliverable at that port. It would, however, be very difficult to make a partial adjustment of this kind, and repeat it as often as it is necessary, and then at the port of final destination make a final adjustment. Hence it is a perfectly well-established rule of the law merchant, that a foreign adjustment, made at any port at which it ought for sufficient reason to be made, is binding upon all the parties to it.<sup>2</sup> This indeed should be regarded as in one sense a port of destination, for it is so for the goods which are to be delivered there.

The practical rule may be stated thus: the adjustment may be delayed as long as all the contributory interests continue together, and should be delayed until the vessel reaches her port of final destination, if they are to continue together so long. But if these interests are to be separated, then the adjustment should be made at the place where the separation first takes place.<sup>3</sup>

We repeat that we consider the rule well established, that an adjustment made at such a port is binding on all the parties; although there are cases, both in England and in this country, which deny its obligation. In our notes we exhibit the authorities on both sides of this question.<sup>4</sup>

<sup>1</sup> *Strong v. N. Y. Ins. Co.* 11 Johns. 323; *Sherwood v. Ruggles*, 2 Sandf. 55; *Chamberlain v. Reed*, 13 Me. 357; *U. S. v. Wilder*, 3 Sumner, 308.

<sup>2</sup> For this purpose the different States of this country are considered as foreign to each other. *Lewis v. Williams*, 1 Hall, 430.

<sup>3</sup> In *Loring v. Neptune Ins. Co.* 20 Pick. 411, 413, *Shaw, C. J.*, alludes incidentally to this rule as follows: "The general average in the present case was made up and adjusted at Hamburg, the port of destination, at which the several interests liable to contribute were necessarily to be separated from each other. Hamburg, therefore, was the proper place for the adjustment and payment of this general average."

<sup>4</sup> In *Power v. Whitmore*, 4 M. & S. 141, an adjustment was made at Lisbon, and wages and provisions were included, which was contrary to the law of England. It was held that the contract was to be construed according to the laws

Whatever uncertainty attends this question arises from still another rule, which is, that, wherever an adjustment be made, it

of England, unless the parties were understood as having contracted on the footing of a different known general usage in the country where the adventure was to terminate. There being no evidence of such usage except the decree of the court, the plaintiff was nonsuited. In *Lenox v. United Ins. Co.* 3 Johns. Cas. 178, a cargo of pipe staves was insured. Some of them were carried in the hold, and others on deck, with the consent of the insurers. The part on deck was jettisoned, and, according to an adjustment made at Lisbon, the cargo in the hold was charged with its proportion of the loss. It was held that the underwriters were not liable for a general average loss; for, although it was decided differently at Lisbon, the port of destination, and the law there was stated to be otherwise, the parties to the contract were to be considered as having in view the law of the State in which it was made, and were to be governed by it. In *Shiff v. Louisiana State Ins. Co.* 18 Mart. La. 629, where a loss by carrying a press of sail to keep off a lee shore was contributed for in general average in Hamburg, it was held that the underwriters were not liable; because, when they agreed to become responsible to the plaintiff for general average, they understood what was known to the laws of their own country as such, — parties always being presumed to contract in relation to their own laws unless the contrary is clearly shown; and that they were not responsible in the instance in question, as by those laws the injury sustained was one of particular average.

In the following cases the rule laid down in the text, that a foreign adjustment is binding upon the parties, is substantiated. *Walpole v. Ewer*, 1789, Park on Ins. (8th ed.) 898, was an action on a policy of insurance upon a respondentia bond on ship and goods, at and from B. to C. The ship was Danish; and an average loss had been sustained, towards which the plaintiff, as holder of a respondentia bond, had been called upon to contribute. For the amount of this contribution the action was brought against the English underwriters. Lord *Kenyon*, C. J., said: "By the law of England, a lender upon respondentia is not liable to average losses, but is entitled to receive the whole sum advanced, provided ship and cargo arrive at the port of destination. The plaintiff contends that, as by the law of Denmark such lenders upon respondentia are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The Danish consul has proved that he received a judgment of the court of Copenhagen, the decretal part of which proves the law of Denmark to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side; but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight than the opinions of advocates, however eminent, or even than the extrajudicial opinions of the most able judges. It seems as if, in this case, the underwriters were bound by the law of the country to which the contract relates." In *Newman v. Cazalet*, Park on Ins. 899, the policy on which the action was brought was upon a cargo of fish from Newfoundland to any port of Spain, Portugal, or Italy. The ship met with bad weather, and put into Alicant and Leghorn to re-

must be made under the principles, practice, and law which in that place regulate adjustment. Now these may be quite different

pair. The captain, being owner, presented a petition to the commercial court of Pisa to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course, adjusted the loss by charging the cargo at its full value, but the ship only at one half, and the freight at one third; and they also charged as a part of the general average the seamen's wages and provisions while in port. The defendant, as underwriter, had paid into court as much as would cover the average, if adjusted according to the memorandum in the policy and the law and usage of England. The question was, whether, the plaintiff having been compelled to pay beyond that sum according to the calculation of the sentence of the court of Pisa, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard. Mr. Justice *Buller* said: "On the general law the plaintiff would fail; but in all matters of trade usage is a sacred thing. I do not like these foreign settlements of average which make underwriters liable for more than the standard of English law. But if you are satisfied it has been the usage, upon the evidence given, it ought not to be shaken." It was proved by several brokers that, in repeated instances, they had adjusted averages under similar sentences in the court of Pisa, and that the underwriters, though with reluctance, had always paid them. The plaintiff had a verdict accordingly.

In *Strong v. Firem. Ins. Co.* 11 Johns. 323, a vessel was moored in the port of Lisbon, and, a violent storm arising, it became necessary, for the preservation of the ship and cargo, to cut away most of her rigging and spars, which damages were made the subject of general average at Lisbon. The point in controversy was whether the defendants were liable to pay the whole amount of the proportion of general average assessed on the cargo according to the adjustment at Lisbon, or only according to the rule adopted in New York. It was held that their liability was determined by the adjustment at Lisbon. The court said: "The general average once being made, and the amount of contribution between the owners of the ship, freight, and cargo ascertained, it appears, at least nothing appears to the contrary, that the underwriters have been held liable for such amount. . . . Indeed, it seems to me that this view of the subject would be conclusive to show that a *bonâ fide* adjustment and payment of a general average ought to be the measure of damages, as between the merchant and insured; otherwise, an insurance would cease to be what it has always been contemplated, — a contract of indemnity. In this case it is distinctly admitted that, as it respects the owners of the cargo and the owners of the vessel, the average was correctly stated, and rightfully paid in Lisbon. That this is a loss for which the insurers are liable is not disputed; and there is no principle more firmly established than that they are bound to return the money which the assured has been obliged to advance in consequence of any peril within the policy, provided it be fairly and honestly paid, and does not exceed the amount of the subscription." After commenting upon the cases of *Walpole v. Ewer*, and *Newman v. Cazalet*, the court continues: "I cannot doubt that at this day the underwriters in Eng-

in different ports. The principal reasons why a foreign adjustment is binding on its owners and shippers may be briefly stated

land are uniformly held responsible for the amount fairly paid under a foreign adjustment of an average loss." The following reference, in the same opinion, to the case of *Lenox v. United Ins. Co.*, which had been previously decided in the same court, although not overruling it, shows that it was not considered as a direct authority in support of the doctrine that a foreign adjustment is not binding upon the insurer: "The question there was, whether the plaintiff should recover a partial loss only, or the amount paid on the adjustment of a general average at Lisbon; and it was decided that he should recover a partial loss only, on the ground that, according to our law, the staves on the deck of the vessel thrown overboard in a storm to lighten her could not be brought into a general average. *What would have been the effect of this adjustment, if the jettison had, according to the laws of this country, formed a proper item in the making it up, is left undetermined.*" In a subsequent case in the same State, *Depau v. Ocean Ins. Co.* 5 Cow. 63, the court decided the question as to the effect of a foreign adjustment in the same way as in *Strong v. Firem. Ins. Co.*, — that case being cited as the authority by which it was guided. In accordance with these decisions was that in *Loring v. Neptune Ins. Co.* 20 Pick. 411. There Chief Justice *Shaw* uses the following language upon the point under consideration: "In general it is to be presumed that both the assured and the underwriter are acquainted with the nature of the business in respect to which they contract; that they are acquainted with the customs and usages of that business, and consent to conform to them, unless there be some stipulation to the contrary. It is well known, therefore, to both parties, that the assured may have to pay, in respect to losses insured against, general averages; that these averages may be adjusted abroad; and that the assured will be bound by such adjustment, although in making it conformably to the law and usages of the places where made, both the sum to be contributed and the contributory interests may be estimated upon principles varying from those which prevail at the place where the contract of insurance is made. This question was discussed by Mr. Justice *Story* in *Peters v. Warren Ins. Co.* 1 Story, 463, and a strong opinion expressed in favor of the binding effect of a foreign adjustment, though he expressly stated that he did not wish to be understood as deciding the point. He says: "Now, certainly, the weight of authority, both in England and America, is that the items included and the sums apportioned and paid according to the law of a foreign country, as a general average in an adjustment thereof made there, and, *a fortiori*, if enforced by the public tribunals there, are, *quoad* the items and the rule of apportionment, conclusive upon and payable by the underwriters here as a general average, although not apportioned in the same manner, and not deemed items of general average by our law. . . . There is nothing unreasonable in construing the engagement of the underwriters in a policy to be that they will pay whatever the insured in a policy is compelled to pay as a general average, arising from the risks insured against."

In *Simonds v. White*, 2 B. & C. 805, this question arose between a shipper and ship-owner, and it was there decided that a loss by general average was to be

thus: if the cargo is to be separated in a foreign port, the contributory share of the cargo leaving the ship should be paid on the spot to the party entitled to contribution. The adjuster at that place must be bound by the law of that place, and cannot be held to know the law of a distant port. And the ship cannot be delayed until he has time to inquire and ascertain that law. The adjustment covers all the interests at risk, and cannot be gone into after-

calculated between them according to the law of the port of discharge; and in the subsequent case of *Dalglish v. Davidson*, 5 D. & R. 6, decided upon the authority of *Simonds v. White*, it was held that the owner of a British ship might avail himself of a statement of average made at the port of delivery in a foreign country, according to the law thereof, so as to charge a British freighter of goods, under a charter made in Britain, with the expenses of wages and provisions for the seamen, incurred during the necessary detention of the ship at an intermediate port, although by the law of England such expenses would not be recoverable as average. The following from the opinion of Chief Justice *Abbott*, in *Simonds v. White*, would seem to apply to the underwriter as well as to the shipper. He says: "The shipper of goods tacitly, if not expressly, assents to general average as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average he must be understood to assent also to its adjustment, and to its adjustment at the usual and proper place; and to all this it seems to us to be only an obvious consequence to add, that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made." See also *Lewis v. Williams*, 1 Hall, 490, where the question was between two shippers, and where Mobile was considered, upon a question of average, to be a foreign port in relation to New York, and where an adjustment made at the former place was held to be binding upon shippers at the latter. In giving the reasons for the rule the court said: "The grounds upon which the foreign adjustment is held conclusive are, that it is the duty of the master to cause the adjustment to be made, and to see to the settlement of the averages; and that the parties are compellable to submit to the assessments upon them, that they may be coerced by suit or by the detention of the goods to pay the contributions as settled there; and if the adjustment could be opened at the home port, and a new rule of apportionment be applied, great and manifest injustice must often be done to some of the parties, without any remedy for the wrong done them by the derangement. . . . In most cases of foreign adjustment the averages are from necessity settled and paid by the parties who are to contribute, without reference to the question of insurance. It would be against the principle and true spirit of the rule to allow the contributory parties who are uninsured to open the adjustment, and to hold it conclusive upon those whose interests are insured and upon their underwriters. There can be no solid ground for the distinction; the adjustment must be equally conclusive upon all the persons and interests actually brought into the settlement of the average."

wards at another place, and reformed throughout (if reformed at all it must be throughout), after a part of the cargo has been left at another place and is out of the reach of the parties. And it may be added that if an owner or shipper loses by the difference in the rules of adjustment in one case, he may gain in another; and this practical rule, like some others of the law merchant, is founded on the average of all the cases, and on the whole does justice.

The two countries of home and of destination may have different systems of law by which this distribution is regulated. If we suppose an adjustment of the loss and distribution made at a foreign port, and this the port of final destination, it must be certain that the owners of all these interests are bound, in reference to each other, by this adjustment.

Courts of common law, both in England and in this country, now acknowledge the law merchant as a part of the common law; but they are, or at least were, more accustomed to cases which are governed by the common law of the land than to those to which the law of the sea should be applied, and to administer justice in cases of the land, by applying to them a system of law admirably adjusted to that end; and they are sometimes disposed to apply the same system to all contracts, maritime contracts and land contracts alike. It might be well if the common-law courts, in judging maritime contracts, were more influenced by a spirit like that manifested by the Emperor Antonine in the rescript which founded for the civil law the law of general average. He says: "I am the lord of the world, but the law is the lord of the sea"; and then goes on to show that in this case, by the lord of the sea, he means the law of the island of Rhodes, which was only the system of rules and usages practised by all engaged in the commerce of the Mediterranean then, as for many previous ages.<sup>1</sup>

We should admit that when an adjustment of average comes in question under a policy of insurance, there may be, at least in some cases, reasons which seem to sustain the views taken by the courts which have been least disposed to admit the binding force of a foreign adjustment. But in this country, and at the present time, we think this force may be considered as universally admitted, at least in cases which come directly under the law of shipping.<sup>2</sup>

<sup>1</sup> Digest, 14, 2, 9.

<sup>2</sup> As to the practical rule, we have what we consider the valuable authority of

It must, however, be remembered that this conclusiveness of a foreign adjustment cannot prevent a party interested from availing himself of a defence against a claim for contribution, which goes to the foundation, not merely of the adjustment, but of the whole right or necessity of any adjustment. Thus, where an adjustment was made on the protest and testimony of the master, the owner of goods on board was permitted to show that the loss arose from the want of care and skill of the master himself, and was not therefore a case for general average adjustment.<sup>1</sup>

## SECTION XXII.

### OF THE ENFORCEMENT OF THE PAYMENT OF CONTRIBUTORY SHARES.

The owners of the property on which the contribution is properly assessed are liable for it in an action by the party by whom it is receivable.<sup>2</sup> The consignee may be the owner of the goods contributing, and then will be liable as owner. He will not, however, be liable merely as consignee. He may refuse to receive the goods from which the contribution is payable. But even if he receives the goods only as consignee, this raises no implied promise on his part to pay the contribution.

The common provisions of the bill of lading under which he claimed and received the goods would not make him liable. If, however, a clause were added that the goods were to be delivered only on payment of contributory charges, as Lord Tenterden suggested, Mr. Dixon, in his handbook of marine insurance and average. On page 162 he says: "I have, as adjuster of averages for one of the principal insurance companies of New York, had an opportunity of examining hundreds of statements in which the column of general average disallowed items which would be admitted by our custom; and, on the other hand, comprehended items which would be disallowed here; and, except in one or two very extreme cases, I have found the average adjusters, by making no readjustment of those items at the home port, practically hold that when a foreign adjustment is rightly settled according to the laws and usages of the foreign port, it is binding, not only as between the parties interested in the adventure, but also as between the assured and the underwriters."

<sup>1</sup> *Chamberlain v. Reed*, 13 Maine, 357.

<sup>2</sup> Lenders on bottomry and respondentia are liable to contribution in general average. *Chandler v. Garnier*, 18 Mart. La. 599. The owner of goods chargeable with general average is personally liable for the amount of his contribution,

gested,<sup>1</sup> this might make him personally liable. He could certainly not claim the goods without paying contribution, but we are not quite certain, that, if the goods were delivered to him without promise of payment on his part, the mere reception of them would make him personally liable for them even under that clause. Such questions, however, can hardly come up under the prevailing practice in this respect.

It is a rule of the law merchant, which we suppose to be a universal one, that the master, as the agent of all concerned, has a lien on all the goods in the ship for their contributory shares.<sup>2</sup> He may refuse to deliver the goods until the contribution be paid, and sometimes does so. But it often happens that the consignees require the goods before an adjustment is made, and consequently before they know their respective shares for contribution; and sometimes a considerable time is required to make a complicated adjustment. To meet such an exigency, the master takes from all the consignees a bond by which each one agrees to pay the contribution due from the goods he receives, when the same shall be adjusted. This is now a common practice.<sup>3</sup>

notwithstanding he has abandoned to the underwriters. *Delaware Ins. Co. v. Delaunie*, 3 Binn. 295.

<sup>1</sup> *Scaife v. Tobin*, 3 B. & Ad. 523. Lord *Tenterden* here says: "There can be no doubt that if a person receives goods in pursuance of a bill of lading in which it is expressed that the goods are to be delivered to him, he paying freight, he by implication engages to pay freight, and so he would to pay general average, if that were mentioned in the bill of lading. But here general average is not so mentioned. It may perhaps be prudent in future to introduce into a bill of lading an express stipulation that the party receiving the goods shall pay general average; but if we were to hold the defendant liable for it in the present instance, we should be going one step further than we are warranted in doing by any decided case."

<sup>2</sup> *Strong v. N. Y. Firem. Ins. Co.* 11 Johns. 323; *Sherwood v. Ruggles*, 2 Sandf. 55; *Thornton v. U. S. Ins. Co.* 3 Fairf. 150; *Chamberlain v. Reed*, 13 Me. 357; *U. S. v. Wilder*, 3 Sumner, 308; *Simonds v. White*, 2 B. & C. 805; *Briggs v. Merchant Traders Ins. Assoc.* 13 Q. B. 167, 174; *Hallett v. Bousfield*, 18 Ves. 187; *Gillett v. Ellis*, 11 Ill. 579. The ship-owner's remedy against the consignee is not lost by the latter's receiving the cargo at the port of necessity, and forwarding it himself to its destination. *Sherwood v. Ruggles*, 2 Sandf. 55.

<sup>3</sup> *Abbott on Shipping* (8th ed.), 614. Where, after a general average loss, the several consignees of the goods, upon the requirement of the master, executed a bond reciting the accident, and admitting that thereby the schooner had been obliged to employ lighters, and to throw overboard a part of the cargo, whereby a general average had accrued, and in which the subscribers agreed to pay their



The question may arise, however, whether this unquestionable right of the master is also his duty; <sup>1</sup> that is, is he bound to retain the goods until the contributory shares are either paid or secured? He is undoubtedly so far the agent of the party entitled to contribution, that if the contributing party pays in good faith to the master all that is due from him, and the master fraudulently keeps the money for his own use, the contributing party is nevertheless discharged from all liability.<sup>2</sup> But is he the agent of the contributing party only with power, and not with duty? The civil law held him bound to collect their shares from all contributing parties, and pay them to, or hold them for the receiving parties.<sup>3</sup> The *Ordonnance de la Marine* of Louis XIV. contains a similar provision; <sup>4</sup> still, it must be stated that Valin, in his *Commentary*, which is of the highest authority, denies that this is done in practice.<sup>5</sup> And we should infer from the language of Abbott, Lord Tenterden, that there was no such law or usage in England.<sup>6</sup>

A singular case before Lord Chancellor Eldon would imply that the master, while he has the right to retain the cargo, is not bound to do so by any obligation to the receiving party, or, at all events, by any which equity would enforce.<sup>7</sup>

respective proportions of the average as soon as adjusted, it was held that this was a personal obligation, and did not bind the shipper of the goods. *Eckford v. Wood*, 5 Ala. 136.

<sup>1</sup> That the captain has a right to demand of the consignee that he sign an average bond before delivery of the goods, see *Cole v. Bartlett*, 4 La. 130.

<sup>2</sup> *Eckford v. Wood*, *supra*.

<sup>3</sup> Dig. 14, 2, 2. See also Wellwood, tit. 21. The owners of a vessel who collect the contributory shares are entitled to a commission of two and one half per cent. *Barnard v. Adams*, 10 How. 270, 308; *Sturgis v. Cary*, 2 Curt. C. C. 382. The language of the court in *Barnard v. Adams*, would imply that the right to charge this commission rested on the custom of average brokers; but in *Sturgis v. Cary*, Mr. Justice *Curtis* stated that he had obtained a copy of the record in that case, and found that no evidence of any usage was offered, and that the presiding judge instructed the jury, as matter of law, that the charge was correct, which ruling, being excepted to, was sustained by the Supreme Court. He accordingly held, that a usage in the city of Boston not to allow such charge was not admissible to contravene the general rule of the law merchant.

<sup>4</sup> Liv. 3, tit. 8, Du Jet. art. 21.

<sup>5</sup> Valin, tom. 2, p. 21. See also Pothier on Maritime Contracts (Cushing's ed.), p. 76, n. 134.

<sup>6</sup> Abbott on Shipping (8th ed.), 613.

<sup>7</sup> *Hallett v. Bousfield*, 18 Ves. 187. In this case a motion was made, by the owner of goods which had been jettisoned for the safety of the vessel and

We are not aware that this point has been distinctly determined by adjudication in England. There are cases which recognize the lien, but do not define it, or state expressly whether the master is not only possessed of a right, but bound by a duty.<sup>1</sup> We are, however, quite confident that both usage and law in this country make it his duty to refuse to deliver the goods to their consignees, unless their contributory shares are paid for or in some way secured. It has indeed been decided, that a shipper, losing the contribution to which he was entitled, by a neglect of the master in the discharge of his duty, may hold the ship-owners responsible.<sup>2</sup>

So, it has been said that, if a master delivers the contributing goods to the consignee without receiving contribution, and then pays it himself to the party entitled to contribution, the master has an implied assumpsit against the consignee for what he has paid.<sup>3</sup> If this be so, it would seem that the reception of the goods should make the consignee liable.

cargo, for an injunction to prevent the master from delivering over the rest of the cargo to the other shippers. The motion was refused by Lord *Eldon*, on the ground that, though the master was not bound to part with any of the cargo, until security should be given by each shipper for his proportion of the loss, yet that any owner of a part of a cargo could not compel him to retain the cargo.

<sup>1</sup> See *Scaife v. Tobin*, 3 B. & Ad. 523; *Simonds v. White*, 2 B. & C. 805. In the latter case, Chief Justice *Abbott* remarks incidentally: "I believe, also, that all are agreed on another point, namely, that the master is not compellable to part with the possession of goods until the sum contributable in respect of them shall be either paid or secured to his satisfaction."

<sup>2</sup> *Gillett v. Ellis*, 11 Ill. 579, 582. In this case, the court say: "The plaintiff's goods having been sacrificed for the common benefit of the owners of the vessel and the remaining portion of the cargo, it is very clear that he was entitled to contribution for them. It was the duty of the master to have caused a general average to be made, and enforced the payment of the part due from the owners of the cargo. He was bound to adjust an average, and he had the right to detain the cargo until the average was paid. It clearly results from this obligation of the master to settle an average, and this right to require payment from the consignees, that the defendants, for whom the master was acting, are responsible to the plaintiff. The latter has the right to recover from them whatever he might have received under a general average, fairly and honestly made. Where the law imposes an obligation on a party, and confers upon him the power of enforcing it, as in this case, by a lien, it equally imposes a liability for the neglect of the obligation." See also *Dupont de Nemours v. Vance*, 19 How. 162, *infra*, p. 477, n. 2.

<sup>3</sup> *Eckford v. Wood*, 5 Ala. 136, 140. The court, in this case, remarked that, "conceding the master cannot sue or be sued, according to the common law, we cannot doubt that if the master, or the consignee, who is his agent, voluntarily

But any claim of the party entitled to receive contribution against the ship-owners on this ground must be founded upon the neglect of the master. If he takes an average bond or other security with due care, or with a reasonable belief that it is sufficient, and the security fails from no fault of the master, the ship-owners should not be bound.

The owner of the goods is liable for his contributory share, although the consignee executes a general average bond ; for this bond is not itself payment of the contributory share, and therefore does not discharge the owner.<sup>1</sup>

It has been held that if one shipper of a general cargo pays all the general average expenses incurred by a common peril, he has a right of action against the other shippers for their proportions.<sup>2</sup> We infer from English authorities that, when the English East India Company charter a ship, they stipulate that there shall be no claim for contribution for general average.<sup>3</sup> We are not aware that such a practice prevails or exists in this country.

Public property is not exempt from liability for a contribution.<sup>4</sup> It could not be reached, however, in this country by a suit against the United States, unless perhaps it were brought before the Court of Claims. But it has been held that the ship-owner has a right of lien against goods belonging to the United States govern-

parts with goods which he is authorized to retain, and afterwards pays the contribution for which he could have retained them, an implied assumpsit is raised that he shall be repaid by the owner."

<sup>1</sup> *Eckford v. Wood*, 5 Ala. 136.

<sup>2</sup> *Kern v. Groning*, 1 Brev. 506 ; *Dobson v. Wilson*, 3 Camp. 480. In *Birkley v. Presgrave*, 1 East, 220, it was held that a special action of assumpsit might be maintained by the owner of a ship against the owner of part of the cargo, to recover from him his proportion of a general average loss, incurred by cutting the cable and part of the tackle of the ship, and applying them to a use for which they were not originally intended, for the general preservation of the whole concern. Park, in his work on Insurance, p. 298 (8th ed.), says : " In the case of an expenditure of money, *probably* an action for money paid *might* be maintained against each of those who were benefited by such expenditure. But as this would lead to a multiplicity of actions, and this species of action is not applicable to the case of goods thrown overboard, the better mode, in all cases, seems to be to apply for contribution to a court of equity, where effectual relief may be obtained against all the parties in one suit."

<sup>3</sup> *Hughes on Ins.* 296 ; *Stevens & Benecke on Av.* (Phil. ed.) 252 ; *Jackson v. Charnock*, 8 T. R. 509.

<sup>4</sup> *United States v. Wilder*, 3 Sumner, 308, 312, *supra*, p. 458, n. 2.

ment, until he is reimbursed what that government should pay by way of contribution in general average. It is in this case that Mr. Justice Story remarks, that the general maritime law gives a lien *in rem* for the contribution; and while this is not always the only remedy, but often the best and sometimes the only one, as it certainly is where the owner of the goods is not known, he adds, that without such a lien the ship-owner would be without any adequate redress, "and would encounter most perilous responsibility." It is not quite certain that he means by this a responsibility for the contribution which any persons were entitled to receive, if he delivered to the contributing shippers their goods without taking security.

If he means this, it would go far to sustain the view we have expressed, that the master, as the agent of the owner, is not only entitled to retain the goods, but is bound to do so, and his language would seem to be too strong to permit the belief that he had in mind only the ship-owner's danger of losing the contributory share to which he was himself entitled.<sup>1</sup>

The practice formerly prevailed to a considerable extent for the owner of the ship to bring a suit *in rem* against the goods bound to contribute, where they had been delivered up by the master.<sup>2</sup>

<sup>1</sup> In the case of *Dupont de Nemours v. Vance*, 19 How. 162, Mr. Justice Curtis remarks as follows upon the subject of liens, in cases of general average: "When a lawful jettison of cargo is made, and the vessel and its remaining cargo are thereby relieved from the impending peril, and ultimately arrive in the port of destination, though the shipper has not a lien on the vessel for the value of his merchandise jettisoned, he has a lien for that part of its value which the vessel and its freight are bound to contribute towards his indemnity for the sacrifice which has been made for the common benefit. And this lien on the vessel is a maritime lien, operating by the maritime law as a hypothecation of the vessel, and capable of being enforced by proceedings *in rem*. . . . The power and duty of the master to retain and cause a judicial sale of the merchandise saved has also been long established. And this right to enforce a judicial sale, through what we term a lien *in rem*, is not confined to the merchandise, but extends to the vessel. . . . It would be extraordinary if the right to a lien were not reciprocal; if it existed in favor of the vessel, when sacrifice was made of part or the whole of its value, for preservation of the cargo, and not against the vessel, when sacrifice was made of the cargo for preservation of the vessel. . . . On full consideration, we are of opinion that, when cargo is lawfully jettisoned, its owner has, by the maritime law, a lien on the vessel for its contributory share of the general average compensation; and that the owner of the cargo may enforce payment thereof by a proper proceeding *in rem* against the vessel, and against the residue of the cargo, if it has not been delivered."

<sup>2</sup> *Mutual Safety Ins. Co. v. Cargo of the Brig George*, Olcott, Adm. 89.

But it was held, by the Supreme Court of the United States, that the lien of the master or owners, being but a common-law lien, could not be enforced in admiralty.<sup>1</sup> We think, however, this case was wrongly decided, for there seems to be no subject over which the admiralty should more properly take jurisdiction, than general average. The reasons on which the decision of *Cutler v. Rae* rests, have been much shaken by recent decisions,<sup>2</sup> and further adjudication is necessary to settle the question. It has been held that a libel *in rem* is maintainable against the vessel in admiralty, by a shipper entitled to contribution.<sup>3</sup>

The right of the master to maintain *assumpsit* against each shipper for the amount severally due, which is given by the common law,<sup>4</sup> is inconvenient and expensive where there are many shippers, and the usual and most effectual way of obtaining relief, at the present day, is by a bill in equity.<sup>5</sup>

<sup>1</sup> *Cutler v. Rae*, 7 How. 729.

<sup>2</sup> In *Dike v. Propeller St. Joseph*, 6 McLean, C. C. 573, the court said: "The decision, however, in the case of *Cutler v. Rae*, was by a divided court, and it has not been satisfactory to the profession, nor was it a decision in accordance with the prior decisions of the Supreme Court. I should conform to it in a case that could not be distinguished from its principles." And in *Dupont de Nemours v. Vance*, 19 How. 162, Mr. Justice Curtis, speaking of *Cutler v. Rae*, said: "The court decided, that, though the master, as the agent of the owner of the vessel in that case, had, by the maritime law, a lien upon the goods, as security for the payment of their just contribution, this lien was lost by their voluntary delivery to the consignee; and that the implied promise to contribute could not be enforced by an action *in personam* against the consignee, in the admiralty. This admits the existence of a lien, arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation; which, as is well known, is waived by an authorized delivery without insisting on payment." If this be the reason for the distinction, it follows that no action will lie *in personam* for freight, where the goods have been delivered up.

<sup>3</sup> *Dike v. Propeller St. Joseph*, 6 McLean, C. C. 573; *Dupont de Nemours v. Vance*, 19 How. 162. In a case prior to this latter decision, Mr. Justice Curtis held, on the authority of *Cutler v. Rae*, that there was no lien *in rem* against the vessel in such a case. *Beane v. The Mayurka*, 2 Curtis, C. C. 72. But the decision in *Dupont de Nemours v. Vance*, to the contrary effect, was given by the same learned judge, and in a still more recent case the correct rule that a lien exists has been laid down. *The John Perkins*, U. S. C. C., Mass., 1857, 21 Law Rep. 87, 96.

<sup>4</sup> *Sherwood v. Ruggles*, 2 Sandf. 55; *Marsham v. Dutrey*, Select Cases of Evid. 58; *Birkley v. Presgraves*, 1 East, 220; *Dobson v. Wilson*, 3 Camp. 480.

<sup>5</sup> *Sturgess v. Cary*, 2 Curtis, C. C. 59; *Patten v. Darling*, 1 Clifford, C. C. 254. See also *Sheppard v. Wright*, Show. P. C. 18; *Doane v. Keating*, 12 Leigh, 391.

## CHAPTER X.

## OF STOPPAGE IN TRANSITU.

## SECTION I.

## OF THE ORIGIN AND HISTORY OF THE RIGHT OF STOPPAGE IN TRANSITU.

THE right of stoppage *in transitu* may be defined as the right by which the seller of goods to a distant purchaser, who becomes insolvent, stops them, if he can do so, before they come into the possession of the purchaser.<sup>1</sup>

It is now quite settled that this right belongs to the seller who sends his goods by land, as well as to him who sends them by sea. And the consideration of it might seem to belong, in some respects at least, to an investigation of the law of purchase and sale. But it originated with waterborne goods, and is still exercised far more frequently in those cases than in land carriage. And it therefore may properly — as it is usually — be regarded as a part of the law of shipping.

When, and how this law of stoppage *in transitu* became a part of the law of England, is not quite certain. Its introduction is comparatively recent; and it is very important to ascertain, if we can do so, the foundation and determining principles of this now well-established rule of law; and some inquiries into its origin and history will help us to do this.

There are in fact three ways, in either of which it might be supposed that the law of stoppage *in transitu* entered into the law of England. One, by adoption from the continental law, which is based upon the civil law. This law, in the case of a sale, does not consider the right of property as passing to the buyer, until he has

<sup>1</sup> See articles on the subject of stoppage *in transitu*, in 7 Am. Law Register, 577, 641.

possession of the goods.<sup>1</sup> It distinguishes carefully, and we think wisely, between the *jus ad rem* which such a buyer gets by the sale to him, and the *jus in re*, into which the *jus ad rem* ripens as soon as the buyer takes possession. It follows, therefore, that the seller continues to own the goods until they reach the buyer. He need not stop them, nor do anything else to re-vest any title in himself. If they are not in the possession of the buyer when the buyer becomes insolvent, they do not pass into his general assets, leaving the seller to take his dividend; but the insolvency leaves the goods the property of the seller. This we understand to have been the principle of the rule in Scotland, and in most other countries in which the civil law prevails. But in Scotland it seems to be otherwise now.<sup>2</sup> In France also, the rule has been made more like our own; that is, some act equivalent to stoppage is required to give to the seller full security in the goods.<sup>3</sup> But it is plain that this rule of the civil law could not be adopted in England, where the precisely opposite rule prevails, namely, that a sale does of itself pass the property to the buyer without delivery. By the civil law, the seller was indeed permitted to reclaim the property from the possession of the buyer, within a short period, on the ground that the speedy insolvency implied fraud, if the very goods had not been sold by the buyer, and could be distinctly separated and identified.

Another way is, by supposing that the seller had, until the goods reached the buyer, a right to rescind the sale for non-payment, provided the buyer became insolvent; and that the act of stoppage *in transitu* was an exercise of this right. This was at one time rather a favorite view; and in some cases the courts seem to have endeavored to establish this as the true theory of stoppage *in transitu*. But they failed, as we think, entirely. We should say that in England the course of adjudication was against this doctrine, and in this country it is so very certainly.<sup>4</sup>

<sup>1</sup> Dig. 18, 1, 19. See also *id.* 19, 1, 13, 8; and 14, 4, 5, 18.

<sup>2</sup> Formerly in Scotland the doctrine of restitution, grounded on presumptive fraud *intra triduum* of the bankruptcy of the buyer, prevailed. The last case in which this doctrine was held was decided in 1789, but on appeal to the House of Lords, the doctrine was reprobated and has since been abandoned, and the law of England on the subject is now in force. Bell's Comm., Book ii. c. vi. § 1.

<sup>3</sup> Code de Commerce, liv. iii. tit. iii. art. 576, *et seq.*; Rodman's Translation, p. 301. See also Bell's Comm. Book ii. c. vi. § 1.

<sup>4</sup> See *post*, p. 484, n. 2.

The third way is, by supposing that the common-law doctrine, of the seller's lien on the goods sold for his price as long as he has them in his possession, continues in force after they have left his possession, and until they have reached the possession of the buyer ; or in other words, that the goods are considered as constructively in the possession of the seller until the buyer has actual possession.

In our own view, we must combine the first and the third of these three ways, in order to account for the law of stoppage *in transitu*, as a part of the English law and of our own.

We mean, that this law, in part as a direct consequence of the rules of the civil law, then even more than now, widely prevailing, and in part from its obvious reason and justice, became a part of the law merchant as established by general usage and custom. That when it came first before the observation of the courts, they found it thus established, and saw it to be reasonable and just, and looked about to find in the English law some principle by means of which it could be received. And they found this in the law of lien, and in the continued constructive possession of the seller ; and thus founded the law of stoppage *in transitu* upon this lien, making the act of stoppage only an exercise of this lien ; and therefore regulating the law of stoppage by the general principles which belong to the law of lien.

We may remark in passing, that this is by no means the only instance in which the English law of lien in the seller is used to neutralize the ill effect of the rule, that the sale without delivery passes the property to the buyer. Indeed, this rule of lien seems to have been devised to supply the want of the civil law distinction between the *jus ad rem* and the *jus in re* ; and if permitted to have this effect, it will aid in the solution of some of the vexed questions of the law of sales.

To return to the origin and foundation of the law of stoppage *in transitu*, we shall find that the cases sustain the views above expressed. The earlier ones certainly do ; and if later authorities have sought, as we have intimated, to change the ground from that of lien to that of rescission, the latest return, as we think, to the original doctrine.<sup>1</sup>

<sup>1</sup> The first notice we have of this rule in the books, is in the case of *Wiseman v. Vandeputt*, 2 Vern. 208, in 1690. It was clearly a case of stoppage *in transitu*.  
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We deem this question, of the origin of the law of stoppage *in transitu*, as one which should be clearly determined, for whether *transitu*; and the right of the seller was sustained by the court, then consisting of lords commissioners, in a very brief opinion, without giving much reason, or referring to much authority or usage. Then came *Snee v. Baxter*, 1 Atk. 245, in which the right is very positively asserted by Lord Chancellor *Hardwicke*. This case is said by *Buller, J.*, in *Lickbarrow v. Mason*, as cited in the note to *Newsom v. Thornton*, 6 East, 20, 28, to be "miserably reported." It is not easy to get at the exact force or application of all that Lord *Hardwicke* says. It seems, however, to be certain that he puts the case on equitable, rather than on legal principles. He says: "He who would have equity, must do equity," and afterwards says: "Though goods are even delivered to the principal, I could never see any substantial reason why the original proprietor, who never received a farthing, should be obliged to quit all claim to them, and come in as a creditor only for a shilling perhaps in the pound, unless the law goes upon the general credit the bankrupt has gained by having them in his custody." This would seem to be an implied approval of the rule of the civil law, and a declaration that the common law is otherwise. His lordship immediately adds: "But while goods remain in the hands of the original proprietor, I see no reason why he should not be said to have a lien upon them till he is paid, and reimbursed what he so advanced; and therefore I am of opinion the defendant had a right to retain them." This is, in the first place, an assertion of the common-law rule of lien in the case of sale, as well established then as it is now; and in the next place, by making this rule the ground of supporting a stoppage *in transitu* (which last two words are used in the decision), it is certain that the Chancellor considered the goods as in the possession of the seller, until they reached the buyer; and that the stoppage *in transitu* was only an exercise of the lien of the seller.

The case would be more valuable in this respect, did it not turn very much on the effect of an assignment by the bankrupt of the bills of lading for the goods. In one paragraph the Chancellor says: "This must depend upon the custom of merchants, and here indeed there is a contrariety of evidence." But from what follows, we apprehend that this diversity related not to the right of stoppage *in transitu*, but to the general usage in reference to the indorsement of the bills of lading.

The next case is also in equity. It is that of *D'Aquila v. Lambert*, Amb. 399, 2 Eden, 75, in 1761. The original seller, who had demanded the goods of the shipmaster, filed a bill to obtain them. The language of the Lord Chancellor, in decreeing for the plaintiff, is quite remarkable. "This is a question of extent and consequence in trade. If it had been *res integra*, I should have required a more extensive argument, and taken time to consider; but it is not a case of difficulty. Has been settled by several determinations, which have been universally approved of by merchants."

It is to be noticed that *Buller, J.*, in his opinion in *Lickbarrow v. Mason*, quoted in a note to *Newsom v. Thornton*, 6 East, 25, considers precisely the question we have above presented, and his words are very emphatic. He says: "I will beg leave to make a few observations on the right of stopping goods *in transitu*, and on the nature and principles of liens. . . . It is a contradiction in

it is a lien, or a right of rescission, is not merely a technical question, but it involves consequences of the utmost importance.

## SECTION II.

### THAT THIS RIGHT IS BUT AN EXTENSION OF THE LIEN OF THE SELLER.

If a seller who stops the goods which he has sold in their transit to the buyer, thereby rescinds the sale, or annuls it, the goods, which by the sale became the property of the buyer, by this annulling of the sale cease to be his property and become again the property of the seller. In other words, the rights and obligations of the parties are the same as if there had never been any sale. Of course the buyer cannot tender the price and take the goods unless the seller chooses to resell them to him. And the seller has his goods but no further claim against the buyer for any deficit in the price. Nor need the seller wait any time, or give any notice, or do any act to complete his title; but may sell the goods at once, to whom he will, as freely as if they had never been sold by him. And if they sell for more than their price, the profit remains with the seller, who sells them as his own.

A totally different state of things is produced by a stoppage *in transitu*, if that stoppage be only the exercise of a lien by the seller, upon the goods of the buyer, for the price of the goods.

terms to say, that a man has a lien on his own goods, or a right to stop his own goods *in transitu*." He goes on to illustrate his position at much length; asserting that, until 1690, "this right, or privilege, or whatever it may be called, was unknown to the law," and declares that it is founded wholly on equitable principles. Although this right thus appears to have originated in equity, it is now said that equity will not enforce it. See *Goodhart v. Lowe*, 2 Jacob & W. 349. It was held in this case that the court would not prevent by injunction the sailing of a ship which had the consignor's goods on board, to enable him to resume possession of them, but would leave him to his remedy at law. And in *Meletopulo v. Ranking*, 6 Jur. 1095, 1 N. Y. Legal Observer, 299, Lord Chancellor *Lyndhurst* intimated that a trial by jury was the proper remedy. In this country, in some of the States, the courts of chancery exercise jurisdiction over stoppages *in transitu*. *Ford v. Sproule*, 2 A. K. Marsh. 528; *Hause v. Judson*, 4 Dana, 7; *Secomb v. Nutt*, 14 B. Mon. 324; *Parker v. M'Iver*, 1 Des. 274. See also *Conyers v. Ennis*, 2 Mason, 236.

Then the goods are in the hands of the seller as a security for a debt due to him from the buyer who owns the goods. It will follow, first, that the buyer or his assigns, by paying whatever is due upon the goods, discharges the lien and destroys the seller's right of possession. Next, that the seller can treat the goods only as if they were pledged to him for the debt; that is to say, he must give notice to the buyer that he intends to sell them for his debt, or get a decree of equity for the sale, and give the buyer, who owns them, a reasonable opportunity of redeeming them, and then he may sell them, but still as the buyer's property; and finally, if the proceeds are more than sufficient to pay the debt and charges, the balance must be returned to the buyer; and if they are not sufficient to pay the debt, the buyer still owes for the balance, and if he has gone into bankruptcy, the seller may come in for a dividend on his balance.

These differences are admitted; and our notes will show, conclusively we think, that the latter supposition, or that of a lien by the seller on the goods of the buyer for their price, is the American theory of stoppage *in transitu*. And there are cases in England, which not only assert this in the broadest terms,<sup>1</sup> but others in which principles drawn from this theory are applied.<sup>2</sup> Thus a

<sup>1</sup> As *Buller, J.*, in *Lickbarrow v. Mason*, cited in the previous note.

<sup>2</sup> This question was discussed in *Clay v. Harrison*, 10 B. & C. 99, but was not decided. See *Stephens v. Wilkinson*, 2 B. & Ad. 320. The authorities are strongly in favor of holding the right of the vendor to stop the goods as an extension of the common-law lien for the price, or, as Lord *Kenyon* observed, in *Hodgson v. Loy*, 7 T. R. 445, as "a kind of equitable lien adopted by the law, for the purposes of substantial justice." The history and character of this right were much discussed in Lord *Abinger's* opinion in *Gibson v. Carruthers*, 8 M. & W. 321. See also *Wentworth v. Outhwaite*, 10 M. & W. 436. In the following cases in England this right has been considered as an equitable lien, and not a rescission of the contract. *Ex parte Gwynne*, 12 Ves. 379; *Martindale v. Smith*, 1 Q. B. 389. See also *Wilmsheurst v. Bowker*, 5 Bing. N. C. 541, 7 Man. & G. 882; *Bloxam v. Sanders*, 4 B. & C. 941; *Edwards v. Brewer*, 2 M. & W. 375; *James v. Griffin*, id. 632. In this country the right is universally considered as an extension of the common-law lien. *Hunn v. Bowne*, 2 Caines, 88, 42; *Rowley v. Bigelow*, 12 Pick. 307, 313; *Stanton v. Eager*, 16 id. 467, 475; *Arnold v. Delano*, 4 Cush. 33; *Hatch v. Lincoln*, 12 Cush. 31, 32; *Newhall v. Vargas*, 13 Maine, 93, 15 id. 314; *Rogers v. Thomas*, 20 Conn. 53; *Jordan v. James*, 5 Ohio, 88. The vendee, or his assignees, may recover the goods, on payment of the price, and the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to

mere surety for the price cannot stop the goods,<sup>1</sup> because the lien exists only between vendor and vendee. And only a consignor who is actually, or virtually and substantially, a vendor, can exercise it.<sup>2</sup> A principal who consigns goods to his factor may certainly stop them on hearing of his factor's insolvency;<sup>3</sup> but so he may generally without the insolvency of the factor, on the common principles of agency. And we should apply the same principles, or analogous ones, to the case of one remitting money for a particular purpose and stopping it on the way, rather than the technical right of stoppage *in transitu*.<sup>4</sup>

Hence, also, from this supposition of a lien, if the consignor sends the goods for a precedent debt he cannot stop them; for this debt, as it were, pays the price for the goods, and there can be no lien.<sup>5</sup> But an unadjusted state of accounts and an uncertainty as to the balance will not prevent a stoppage;<sup>6</sup> nor will the accept-

deliver them upon payment of the price. If he has been paid in part, he may stop the goods for the balance due him, and the part payment only diminishes the lien *pro tanto* on the goods detained. *Kymer v. Suwercropp*, 1 Camp. 109; *Newhall v. Vargas*, 13 Maine, 93, 15 id. 314.

<sup>1</sup> *Siffken v. Wray*, 6 East, 371.

<sup>2</sup> Thus, if a trader in one country should send an order to his correspondent in another country to procure and ship him certain goods, which the latter should procure *on his own credit*, without naming the principal, and ship them to him at the original price, adding only his commission, he would be considered as a vendor so far, at least, as to give him the right of stoppage *in transitu*. *Feise v. Wray*, 3 East, 93; *Newhall v. Vargas*, 13 Maine, 93. See also *Ilsey v. Stubbs*, 9 Mass. 65, per *Sewall, J.*; *Tucker v. Humphrey*, 4 Bing. 516.

<sup>3</sup> *Kinloch v. Craig*, 3 T. R. 119, 783.

<sup>4</sup> *Smith v. Bowles*, 2 Esp. 578. *Aliter*, where it is a general remittance from a debtor to his creditor on account of his debt.

<sup>5</sup> *Haille v. Smith*, 1 B. & P. 563; *Smith v. Bowles*, 2 Esp. 578; *Vertue v. Jewell*, 4 Camp. 31; *Clark v. Mauran*, 3 Paige, 373; *Wood v. Roach*, 1 Yeates, 177, 2 Dall. 180; *Summeril v. Elder*, 1 Binn. 106. See also *Anderson v. Clark*, 2 Bing. 20; *Evans v. Nichol*, 4 Scott, N. R. 43.

<sup>6</sup> *Wood v. Jones*, 7 Dowl. & Ry. 126. In this case a merchant in England sent goods of a given value to a merchant at Quebec for sale on his account. Before the goods were sold or the proceeds ascertained, the latter shipped three cargoes of timber to the former, to credit in his account. Two of them arrived. Against the third the consignor drew a bill for the amount, while it was *in transitu*. In the interval the consignee dishonored the bill, and became insolvent. Held, that the consignor had a perfect right of stoppage *in transitu*, and was not bound to wait until the mutual accounts between him and the consignee were finally adjusted.

ance of negotiable paper, even where that is deemed payment,<sup>1</sup> unless it be indorsed over; and if such a bill be proved before commissioners of insolvency, the dividend paid on it will be considered only as so much paid towards the price of the goods, even though the bill is not yet mature.<sup>2</sup> Nor will the actual receipt of part payment;<sup>3</sup> for neither of these would destroy the lien of the seller. And if there be a part payment and the seller afterwards stops the goods *in transitu*, the buyer cannot recover back the part payment, as he might do if the stoppage *in transitu* were a rescission of the sale.<sup>4</sup> But it has been held that if a note paid for the goods be dishonored, and at the time of dishonor be in the hands of an indorsee for value, the lien is gone.<sup>5</sup>

### SECTION III.

#### WHEN THE RIGHT MAY BE EXERCISED.

##### A. *Of the Constructive Possession of the Seller.*

While the seller retains actual possession of the goods, the ancient rule of lien makes them his security.<sup>6</sup> When the buyer takes them into his actual possession, all lien of the seller is at an end. The stoppage must, therefore, be only while the goods

<sup>1</sup> *Arnold v. Delano*, 4 Cush. 33.

<sup>2</sup> *Feise v. Wray*, 3 East, 93; *Jenkyns v. Usborne*, 7 Man. & G. 678; *Newhall v. Vargas*, 13 Maine, 93; *Bell v. Moss*, 5 Whart. 189; *Donath v. Broomhead*, 7 Barr, 301. It has been said that the consignor need not tender back the bill. *Edwards v. Brewer*, 2 M. & W. 375; *Hays v. Mouille*, 14 Penn. State, 48.

<sup>3</sup> *Hodgson v. Loy*, 7 T. R. 440; *Newhall v. Vargas*, 13 Maine, 93.

<sup>4</sup> *Newhall v. Vargas*, 13 Maine, 93.

<sup>5</sup> *Bunney v. Poyntz*, 4 B. & Ad. 568; *Horncastle v. Farran*, 3 B. & Ald. 497. *Contra*, *Miles v. Gorton*, 2 Crompt. & M. 509.

<sup>6</sup> In *McEwan v. Smith*, 2 H. L. Cases, 309, Lord Campbell, speaking of the case where the vendor had not parted with the possession, said: "Several of the judges in the court below discussed at great length the question of stoppage *in transitu*. That doctrine appears to me to have no more bearing on this case than the doctrine of contingent remainders." It was held, in this case, that the vendor, not having parted with the possession, had a right to retain the goods. See also *Parks v. Hall*, 2 Pick. 206, 212; *Gibson v. Carruthers*, 8 M. & W. 321; *Miles v. Gorton*, 2 Crompt. & M. 504.

are *in transitu*;<sup>1</sup> and that is when they are not in the actual possession of either. But in the application of the rule the law goes somewhat further, and inquires also into the constructive possession of the goods. For they may be in the actual possession of the seller, and yet so far, constructively, in the possession of the buyer that the seller cannot stop or retain them. Or they may be in the actual possession of the buyer, but under such circumstances that the seller's right of stoppage is not taken away. It becomes, therefore, very important to ascertain when the transit, so far as this right is concerned, ceases.

We will consider this question under the different heads of goods warehoused, goods in the hands of a carrier, goods on board of a ship, and goods transferred by a bill of lading.

### B. Of Goods Warehoused.

In general, every warehouse-man is the agent of any party who puts the goods in his warehouse, and can take them out at his pleasure; and, therefore, his possession is the possession of such party. This is carried so far, that where a seller had a warehouse, and it was a part of the bargain of sale that the goods might remain in his warehouse until the buyer took them out, without charge, and they remained there after the sale under this bargain, it was held that this actual possession of the seller was the constructive possession of the buyer, and that the seller could not stop or retain them for the price.<sup>2</sup>

<sup>1</sup> *Wood v. Yeatman*, 15 B. Mon. 270; *Warren v. Sproule*, 2 A. K. Marsh, 528, 536. In *Conyers v. Ennis*, 2 Mason, 236, before Mr. Justice Story, it was urged that the right of the consignor to stop property, in cases of insolvency, ought not to be confined to stoppage *in transitu*, but should, in equity, extend to all cases where the property is not paid for, and remains in the hands of the consignee. But that learned judge held, that the right of the consignor was gone as soon as the goods reached the consignee, and that equity could not relieve the seller.

<sup>2</sup> *Barrett v. Goddard*, 3 Mason, 107. See also *Hammond v. Anderson*, 4 B. & P. 69. *Townley v. Crump*, 4 A. & E. 58, is, however, *contra*. In *Miles v. Gorton*, 2 Crompt. & M. 504, the goods, in the warehouse of the vendor, were sold under an invoice which expressed that they were to remain at rent. A bill of exchange for the price was given and negotiated, but before maturity the vendee became bankrupt. Held, that the vendor had not lost his lien. The court said: "Here, in point of fact, the warehouse rent was not actually paid, but only charged, and such charge amounted to a notification by the seller to the purchaser that he was

On this point it is a material question whether anything remains to be done by the seller ; if nothing, this goes far to make the warehousing a delivery to the buyer ; not so, however, if the seller must still do something to or with the goods before they are delivered.<sup>1</sup>

not to have the goods, not only until the payment of the price, but of the rent. In this case, therefore, the vendor had originally a right to hold, both for the price and the rent ; and I think that the effect is not to make, as has been argued, the warehouse of the vendor the warehouse of the vendee, but to make it a part of the contract between the parties, that the goods are not to be delivered until not only the price, but the rent, is paid." It may perhaps be doubted whether *Barrett v. Goddard* is not founded on a misapprehension of *Hurry v. Mangles*, 1 Camp. 452. In the latter case the goods were sold by the vendee to a third party, and it was held that the original vendor, by accepting rent from this third party, *attorned* to him. *Barrett v. Goddard* would seem to be opposed by *Dixon v. Yates*, 5 B. & Ad. 340, and *Townley v. Crump*, 4 A. & E. 58. *Phillimore v. Barry*, 1 Camp. 513, holds that when goods are sold to be paid for in thirty days, and if not paid for at the end of that time, *rent* to be paid, the *property* passes. *Hammond v. Anderson*, 4 B. & P. 69, decides that, where goods were sold under an entire contract, and an order given to the wharfinger to deliver them to the vendee, who weighed the whole and took away part, on subsequent dishonor of the note, the vendor could not stop the remainder for the price. In *Arnold v. Delano*, 4 Cush. 33, the owner of a large quantity of wood, which was then lying in a pile on his own land, having sold a portion of the same, measured off and marked the part sold. It was agreed that the purchaser might remove the wood within a year. A bill of sale was given and payment made by a promissory note, payable in six months. Before the expiration of this time the purchaser became insolvent. The court held that although there was a sale of the goods and a constructive delivery, yet, as the vendor remained in possession, he had a higher equity to retain for the price than the assignee of the debtor, and that the note, while it remained in the hands of the vendor, and not negotiated, was to be regarded merely as evidence in writing of a promise to pay for the goods purchased, and did not vary the rights of the parties.

<sup>1</sup> *Hanson v. Meyer*, 6 East, 614. In this case a person contracted to sell all his starch then at the warehouse of another at £6 per hundred weight, to be paid for by a bill of exchange. A certain number of days were allowed for delivery. The vendor wrote an order to the warehouse-man to weigh and deliver the starch. Held that the property did not pass so as to defeat the right of the vendor to stop the goods, till they were weighed. In *Wallace v. Breeds*, 13 East, 522, a quantity of oil in casks was sold. By the usage of trade the casks were to be searched by the seller's cooper ; and a broker, on behalf of both the buyer and seller, was to attend to make a minute of the foot-dirt and water in each cask, and the casks were then to be filled up by the cooper with oil at the seller's expense, and delivered in a complete state. Held, that until these things were done the right existed. See also *Rugg v. Minett*, 11 East, 210 ; *Zagury v. Furnell*, 2 Camp. 240 ; *Stoveld v. Hughes*, 14 East, 308 ; and cases *infra*, p. 490, note 2.

If a seller of goods that are warehoused deliver an order for them to a buyer, this alone may not transfer the possession.<sup>1</sup> But if the buyer delivers the order to the warehouse-man, this, in general, does transfer possession;<sup>2</sup> and still more so if the warehouse-man enter the same in his books, or otherwise accept the order so as to be responsible for the goods to the buyer;<sup>3</sup> or if the

<sup>1</sup> *McEwan v. Smith*, 2 H. L. Cases, 309. The facts in this case were as follows: J. & A. Smith, the owners of sugars in the warehouse of Messrs. Little & Co., sold them to Bowie & Co., and gave them a delivery order for the sugars upon their agent, Alexander. In the books of the warehouse-men the sugars were entered as received by them from Alexander on account of J. & A. Smith. Alexander had them weighed and invoiced upon the order of the Smiths. Bowie & Co. sold the sugars to McEwan & Sons, and transferred to them the delivery order. Neither of the vendees took any steps to act upon the order. Bowie & Co. having become insolvent, the Smiths removed the sugars to another warehouse. It was held that they had never lost possession of the goods, and that a delivery order does not, like a bill of lading, pass the property in goods by being indorsed over. See also *Akerman v. Humphery*, 1 Car. & P. 53; *Tucker v. Humphrey*, 4 Bing. 516; *Jenkyns v. Osborne*, 7 Man. & G. 678. Nor are dock warrants negotiable instruments. *Zwinger v. Samuda*, Holt, N. P. 895, 7 Taunt. 265. But if the goods remain in the warehouse of the vendors, and they give the vendees samples to enable them to go into the market, and, upon sales by them from time to time to different purchasers, orders are given to enable them to receive the goods from the vendors, who deliver such parcels accordingly, the property of the whole passes to the vendees. *Green v. Haythorne*, 1 Stark. 447.

<sup>2</sup> *Lucas v. Dorrien*, 7 Taunt. 278. There is also a *dictum* of the court *in banc* to this effect in *Harman v. Anderson*, 2 Camp. 243. In *Hollingsworth v. Napier*, 3 Caines, 182, the goods were in a public store at the quarantine ground. The owner sold them to one Kinworthy, for cash payable on delivery, and gave him a bill of parcels of the goods and a delivery order on the storekeeper. Kinworthy, without paying for the goods, or taking possession of them, sold them to a third party, whom the jury found to be a *bonâ fide* purchaser. This person went the next day, paid the storage, marked the goods with his initials, and returned them to the public store. Held that the original vendor had no right to stop them.

<sup>3</sup> *Harman v. Anderson*, 2 Camp. 243. The effect of the transfer in the books of the wharfinger is ordinarily to constitute him the agent of the vendee. But this is not always the case. In *Godts v. Rose*, 17 C. B. 229, 33 Eng. & Eq. 268, an action of trover was brought for certain casks of oil. The plaintiff had contracted, by bought and sold notes, to sell to the defendant oil at a certain price, "to be free delivered and paid for in fourteen days by cash, less £2 10s. per cent discount." The oil being at a wharf, the plaintiff gave an order to the wharfinger to transfer a specified quantity of it to the defendant. The wharfinger thereupon transferred it in his books, and gave the plaintiff a notice of the transfer directed to the defendant. This the plaintiff's clerk took to the counting-house of the de-



buyer has acted under the order and removed a part of the goods.<sup>1</sup> But even after such an order is given, if the seller has an important thing to do to or with the goods before their delivery, he may countermand the order.<sup>2</sup>

If the buyer sells to a third party, to whom the warehouse-man certifies that the goods are transferred to his account, and who thereupon pays the price, the warehouse-man becomes responsible to this third party, although something material may remain for

defendant, and delivered it to a clerk there, together with an invoice of the oils, and demanded a check in payment. This was refused, but the notice of transfer was retained by the defendant, and the oil obtained by means of it. Held, that as the sale was of no specific oil, the facts above stated did not amount to a delivery to the defendant. *Jervis, C. J.*, states the law as follows: "No doubt if the vendor had given the vendee the transfer order, and the vendee had taken it to the wharfinger, and the latter had assented to the transfer, that would have bound the vendor. There must be shown to have been that kind of triangular contract adverted to in *Williams v. Everett*, 14 East, 582, where the agent of the one party becomes by agreement between all three the agent of the other. In this case there has been no such agreement of attornment, the wharfinger made no bargain with the vendee to hold for him, nor did the vendee make any bargain to accept the wharfinger as his agent. The transfer order was given to the vendee only on a condition with which he refused to comply, and there could be, therefore, no such acquiescence as was necessary to change the property in the goods in the hands of the wharfinger." In *Townley v. Crump*, 4 A. & E. 58, where the goods sold were in the warehouse of the vendor, it was held that the following delivery order, or acknowledgment, given to the vendee, would not take away the right of the vendor to retain possession, "We hold to your order," etc., describing the goods.

<sup>1</sup> *Hammond v. Anderson*, 4 B. & P. 69.

<sup>2</sup> *Withers v. Lys*, Holt, N. P. 18, 4 Camp. 237; *Busk v. Davis*, 2 M. & S. 397; *Shepley v. Davis*, 5 Taunt. 617. But if the identity of the goods and the quantity are known, as where oats in a particular bin, which contains nothing else, are sold, and a bill accepted at the same time for the price, the weighing is merely for the satisfaction of the buyer, and the transfer in the books of the wharfinger is sufficient, although the delivery order describes the goods by the weight as well as the bin ("1,028 bushels of oats in bin 40"), and directs the warehouse-man to weigh them over. *Swanwick v. Sothorn*, 9 A. & E. 895. In *Whitehouse v. Frost*, 12 East, 614, A, having forty tons of oil in one cistern, sold ten tons to B, and received the price. B sold the same to C, and took his acceptance at, four months, and gave him a written order of delivery on A, who wrote and signed his acceptance upon the order, but no actual delivery was made of the ten tons, which continued mixed with the rest in A's cistern. Held that, as nothing remained to be done between B and C, B could not countermand the order on the bankruptcy of C.

the original seller to do to the goods.<sup>1</sup> And if the seller, by acts or words, or, we should say, if he by his unqualified order, justified the warehouse-man in so certifying, he would be responsible to the warehouse-man; or, to prevent circuitry of action, he would be held as losing his right of stoppage *in transitu*. The cases which we have already cited lead to this conclusion.

If a buyer, either because he has no warehouse of his own, or because the warehouse of a carrier is more convenient to his customers, or indeed for any reason, causes his goods to be left at that warehouse, and sells them from thence without any purpose of removing them before sale to any warehouse or place of deposit of his own, the transit is ended as soon as the carrier deposits the goods in his own warehouse subject to the order of the buyer.<sup>2</sup>

### C. *When the delivery on Ship-board terminates the Transit.*

It is, of course, while the goods are in the hands of a carrier, that they are most frequently stopped.<sup>3</sup> Indeed, the law originally applied only to carriers by water; and for this purpose any ship which has the goods on board is deemed a carrier.<sup>4</sup>

A nice distinction is taken, which has been much questioned, but which seems to us to be just, when the ship is owned by the buyer of the goods. For it has been held that if they are placed

<sup>1</sup> *Stonard v. Dunkin*, 2 Camp. 344. The plaintiff, in this case, gave in evidence an order from one Knight, to the defendants, who were warehouse-men, to hold a quantity of malt on the plaintiff's account, and a written acknowledgment from the defendants that they so held it. It was contended that a remeasuring being necessary in an article of that kind, the property did not pass till this was done. But Lord *Ellenborough* said: "Whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing they attorned to him, and I should entirely upset the security of mercantile dealing, were I now to suffer them to contest his title." See also *Hawes v. Watson*, 2 B. & C. 540; *Barton v. Boddington*, 1 Car. & P. 207; *Gosling v. Birnie*, 7 Bing. 339; *Swanwick v. Sothorn*, 9 A. & E. 895.

<sup>2</sup> See *post*, p. 498, tit. F.

<sup>3</sup> And it makes no difference whether he be a carrier by land or by water. *Stokes v. La Riviere*, cited 3 T. R. 466; *Hunter v. Beal*, cited 3 T. R. 466.

<sup>4</sup> *Assignees of Burghall v. Howard*, cited 1 H. Bl. 365. And this is true, although the goods by the bills of lading are deliverable to the consignees.

on board his own ship, to be carried to him, they are in transit until they reach him in the same way as if he did not own the ship.<sup>1</sup> But if they are placed in his ship to be carried by his

<sup>1</sup> This distinction was recognized in the case of *Stubbs v. Lund*, 7 Mass. 453. There the vendors resided in Liverpool, England, and the vendees in America. The goods were delivered on board the vendees' own ship, at Liverpool, and consigned to them, or assigns, for which the master had signed bills of lading. The vendors, hearing of the insolvency of the vendees before the vessel left Liverpool, refused to let the vessel sail, claiming a right to stop the goods because they had not reached their destination. The right of stoppage was allowed mainly, it seems, on the ground that the goods were, by the bills of lading, to be transported to the vendees, and were in transit until they reached them; but it was thought that if the goods had been intended for some foreign market, and never designed to reach the possession of the purchasers, any more than they then had at the time of their shipment, the case would have been different, and the transit would have been considered as ended. *Parsons*, C. J., thus stated the law: "In our opinion the true distinction is, whether any actual possession of the consignee or his assigns, after the termination of the voyage be, or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stopping in *transitu* remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping in *transitu* continues after the shipment (3 East, 381): but if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping in *transitu* ceases on the shipment, the transit being then completed: because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment." See also *Ilsey v. Stubbs*, 9 Mass. 65, 72. This distinction is also followed in *Newhall v. Vargas*, 13 Maine, 93. The purchaser, in this case, lived in America, the consignor in Havana. The former sent his own vessel to Havana, for a cargo of molasses, which was shipped on board the vessel, consigned to the vendee, and to be delivered to him at his port of residence; it was held that the vendor had the right to stop the goods at any time before they came into the actual possession of the vendee, and *Stubbs v. Lund* was fully approved of. On the other hand, the supreme court of Pennsylvania, in the case of *Bolin v. Huffnagle*, 1 Rawle, 9, after full and learned arguments, held the distinction above taken to be incorrect and unsupported by authority. In *Fowler v. M'Taggart*, cited 1 East, 522, the broad proposition was laid down that a delivery of goods into a ship chartered by the vendee defeated the vendor's right to stop in *transitu*. It does not appear from the report of this case whether the goods were to be conveyed to the vendee, or to a third party, but in the subsequent case of *Bohtlingk v. Inglis*, 3 East, 381, it is said by the court that the goods were put on board not to be conveyed to the bankrupts, but that they might be sent by them on a mercantile adventure. This case is also cited by counsel in *Hodgson v. Loy*, 7 T. R. 440, 442. The ship was chartered by the bankrupts for three years, and the captain was hired and paid

orders to another place, since they will never be any more in his possession than they are when on board, this terminates the

by them, so that they had the exclusive control of the vessel. In *Inglis v. Usherwood*, 1 East, 515, the general principle seems to have been admitted by all the judges that a delivery of goods by the vendors on board a ship chartered by the vendee, is the same as a delivery to the vendee. But the delivery in this case was made in Russia, and by a law of that country goods may be stopped in such case. It was therefore held that the vendors had not lost their right of stoppage. And in *Boehtlinck v. Schneider*, 3 Esp. 58, it was held that the law of Russia not being provable by parol, the case stood on the general law, and therefore a delivery being made by the consignor on board the ship chartered by the consignee, the *transitus* was ended. But in the subsequent case of *Bohtlingk v. Inglis*, 3 East, 381, the question arising whether the vendors had acted in accordance with the law of Russia, the court laid that element out of the case, and held that, by the general maritime law, where a person in England chartered a vessel to go to Russia, and bring goods home from there, the delivery on board the vessel was not a final delivery, on the ground that they "were on their passage or transit from the consignor to the consignee." *Thompson v. Trail*, 2 Car. & P. 334, merely decides that a direction by the vendee to the vendor to send the goods by a particular ship will not defeat the right of the latter to stop them. In *Van Casteel v. Booker*, 2 Exch. 691, goods were put on board the vessel at Rio bound "for Cork or a market," consigned to the bankrupts who were merchants at Liverpool, and owners of the vessel. Mr. Baron *Parke* said, that if goods were put on board to be carried for and on the account of the risk of the bankrupts "the delivery on board put an end to the right of stopping *in transitu*, for the delivery on the vendee's own ship is a final delivery at the place of destination, especially where, as in this case, its final port of discharge was not then determined, and it required further orders at Cork to give the vessel its destination. On that supposition the goods were at their journey's end; for it was not intended necessarily that they should ever come otherwise into the possession of the buyer than by being in that of the agent for carrying, the master." *Mitchel v. Ede*, 11 A. & E. 888, was decided on the ground that the ship was a general one. *Turner v. Trustees of the Liverpool Docks*, 6 Exch. 543, 6 Eng. L. & Eq. 507, is an important case on this point. There A. & Co., residing in Charleston, South Carolina, consigned cotton to B. & Co., living at Liverpool, and delivered it on B. & Co.'s own vessel at Charleston, taking a bill of lading to deliver to their order, or their assigns, they paying no freight, "*being owners' property*." The consignors indorsed the bill to the "Bank of Liverpool or order." The consignee became bankrupt before the cotton arrived at Liverpool. The consignors, on its arrival, claimed a right to stop the cargo *in transitu*. The assignees in bankruptcy claimed the cotton, as having been completely vested in the bankrupts as soon as it was put on board their own vessel at Charleston, specially appointed by them to bring home such cargo. *Patteson, J.*, said: "There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case, the

transit.<sup>1</sup> We see no reason why the same rule should not apply to a ship which is chartered or hired by the buyer of the goods. If it appears, however, by the bill of lading, that the goods were put on board to be carried on account and at the risk of the consignee, this vests the property in him, and puts an end to the transit.<sup>2</sup>

vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool to their order or their assigns, and that, therefore, was not a delivery of the cotton to the purchasers as owners, although there was a delivery on board their ship. The vendors still reserved to themselves at the time of the delivery to the captain a *jus disponendi* of the goods which he, by signing the bill of lading, acknowledged, and without which it may be assumed the vendors would not have delivered them at all." See also as to the right of the consignor thus to maintain his right of stoppage, *Ellershaw v. Magnaic*, 6 Exch. 570, note; *Wait v. Baker*, 2 Exch. 1; *Van Casteel v. Booker*, 2 Exch. 691. Lord Chancellor *Lyndhurst*, *In re Humberston*, 1 DeG. 262, seems also to have been of opinion, that a delivery on board the vendee's own ship was in effect a delivery to him, although they were to be conveyed to the vendee.

<sup>1</sup> *Fowler v. M'Taggart*, cited in 1 East, 522, 3 East, 396. The distinction is also recognized in the cases cited in the preceding note, and fully supported in *Rowley v. Bigelow*, 12 Pick. 307, 314. The court there said: "We think it very clear, that a delivery of the corn on board of a vessel appointed by the vendee to receive it, not for the purpose of transportation to him, or to a place appointed by him to be delivered there for his use, but to be shipped by such vessel, in his name, from his own place of residence and business to a third person, was a termination of the transit, and the right of the vendor to stop *in transitu* was at an end." See also *Noble v. Adams*, 7 Taunt. 59.

<sup>2</sup> *Wilmshurst v. Bowker*, 7 Man. & G. 882; *Van Casteel v. Booker*, 2 Exch. 691, 708; *Jenkyns v. Brown*, 19 Law J. N. S. Q. B. 286; *Key v. Cotesworth*, 7 Exch. 495, 14 Eng. L. & Eq. 435. See also *Cowas-jee v. Thompson*, 5 Moore, P. C. 165. In this case goods contracted to be sold and delivered "free on board," to be paid for by cash, or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which, the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill which they accepted was running, became insolvent. Under these circumstances it was held that trover would not lie for the goods, for that on their delivery on board the vessel they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. In *Meletopulo v. Ranking*, 6 Jur. 1095, 1 N. Y. Legal Observer, 299, one Sargent commissioned the plaintiff to purchase at different places a cargo of

If the buyer orders the goods to be sent to some other person, by any suitable conveyance, without designating any one especially, or by a designated carrier who is not specifically his agent or servant, the goods remain *in transitu* until they reach that second person. For he is only as the buyer; or as a second buyer; and a second buyer, without possession, can no more defeat the lien of the seller than the first buyer.<sup>1</sup>

If the buyer orders the goods to be delivered on board a vessel named by him, to be carried to a distant consignee whom he names, it seems that if the seller takes a receipt from the ship-master as for his own goods, he preserves his own lien on them.<sup>2</sup> And if he demands such a receipt at the time of shipment, and it be not delivered, the seller acquires, by his mere demand, a right as against the master.<sup>3</sup>

#### D. *How the Lien of the Carrier affects this Right.*

A carrier of goods, by land as well as by sea, acquires a lien on the goods which he carries for the freight-money. If the carrier who owns the ship is also the buyer of the goods, this may give rise to cross liens. The ship-owner has a lien for the freight as against the seller. The seller has a lien for the price as against the ship-owner who is buyer. The law adjusts these cross liens thus. The ship-owner being in actual possession of the goods in his own ship, holds on to them until the freight is paid; but then the right and lien of the seller come into force. He may, by paying freight, acquire a right to the possession of the goods as his security; and cannot otherwise. If the ship-owner have died insolvent, or have transferred his assets to assignees, and with them the ship and cargo, the shipper of the goods, by tendering freight

currants which were to be shipped at Vostizza for England. The currants arrived at Vostizza, and Sargent chartered a vessel and directed that they should be sent to the Messrs. Ranking. Sargent had an agent at Vostizza, who would have attended to the goods, but being sick, the plaintiff put them on board. The bill of lading, however, stated that they were shipped by the agent on account of Sargent. Lord Chancellor *Lyndhurst* held that this showed that the delivery to Sargent was complete.

<sup>1</sup> *Craven v. Ryder*, 6 Taunt. 433; *Dixon v. Yates*, 5 B. & Ad. 313.

<sup>2</sup> *Craven v. Ryder*, 6 Taunt. 433.

<sup>3</sup> *Ruck v. Hatfield*, 5 B. & Ald. 632.

to the executor or administrator in the first case, or to the assignees in the second, may maintain an action of trover against them for the goods; but not otherwise.<sup>1</sup>

Usually the carrier is a third party, who stands in no particular relation to the goods, or to the buyer or seller. In such case his lien for the freight creates no difficulty. Whoever claims the goods must pay him for carrying them; and it is immaterial to him whether buyer or seller does this. But a seller who seeks to stop the goods *in transitu*, is bound to pay the carrier only his freight for these very goods, and not his general demand against the buyer.<sup>2</sup> If the carrier holds them from the buyer by his lien for freight, while he holds them they are in transit, because not yet in the possession of the buyer. And where a carrier landed a part on the wharf of the consignee, but took it back again and held that part with the rest for his freight, it was held that this delivery did not extinguish the right of the seller.<sup>3</sup> Payment of freight by the buyer is not, of itself, sufficient to terminate the transit or to take away the right of stoppage.<sup>4</sup>

It may be added, that a carrier who agrees to look for his freight to the consignor, cannot detain the goods for freight, from the consignee.<sup>5</sup> And if he so detain them after a demand from a buyer or consignee otherwise entitled to the possession, we should say that this unlawful detention would no more continue the right of stoppage, than an unlawful delivery would defeat it.<sup>6</sup>

<sup>1</sup> Newhall v. Vargas, 15 Maine, 314.

<sup>2</sup> Oppenheim v. Russell, 3 B. & P. 42.

<sup>3</sup> Crawshay v. Eades, 1 B. & C. 181; Edwards v. Brewer, 2 M. & W. 375.

<sup>4</sup> Thus, in Donath v. Boomhead, 7 Barr. 301, the consignee paid the freight, but, having lost the invoice, was unable to enter the goods at the custom-house, in consequence of which they were seized by the officers and removed from the vessel. Before the duties were paid the consignee became insolvent, and the court held the *transitus* was not ended. See also Mottram v. Heyer, 5 Den. 629.

<sup>5</sup> Butler v. Woolcott, 5 B. & P. 64.

<sup>6</sup> This seems to be the correct rule, and in a controversy between the vendor and the assignees of the bankrupt, it has been so held; Bird v. Brown, 4 Exch. 786, 797. See also Naylor v. Dennie, 8 Pick. 198, 203, per Parker, C. J. But in Allen v. Mercier, 1 Ashm. 103, the court were of opinion that, in a case where the goods had arrived at the place where the vendee lived, and were demanded by him, he tendering freight, but the carrier refused to deliver them until an old claim was settled, and carried them back to the place where the vendor lived,

*E. When Goods are lodged in the Custom-house.*

Whether, if goods be lodged in the custom-house, or the national warehouse, the transit is ended before the duties are paid and everything done which is necessary to give the consignee the right to withdraw them at pleasure, seems not to be certain on the authorities. We should say, on principle, that if the goods pass from the ship to the warehouse because the consignee has no right to them, not having paid the duties, or otherwise satisfied the requirement of law, it cannot be said that he has ever taken possession of them. And, therefore, the seller may discharge all these claims upon them and establish his lien for the price.<sup>1</sup> If the goods were ever delivered to the consignee, no subsequent

the latter was entitled to maintain replevin against the carrier on tendering freight.

<sup>1</sup> It was proved, in *Northey v. Field*, 2 Esp. 613, that twenty days were allowed after the ship's arrival to pay the duties, during which time the goods remained on board, and if not paid within that time they were taken to the king's cellars, and kept there three months and then sold, but the owner might have them at any time on payment of duties. The vendees became bankrupt after the ship's arrival, within the twenty days. The goods were removed to the cellars, and the day before the three months expired the agent of the consignors demanded them. Held, that the *transitus* was not ended, and the consignors were entitled to recover. *Nix v. Olive*, Abbott on Shipping, 538, and *Burnham v. Winsor*, U. S. D. C. Mass., 5 Law Reporter, 507, are to the same effect. In *Donath v. Broomhead*, 7 Barr, 301, the goods were not entered on account of the loss of the invoice. The court held that the transit was not complete. *Mottram v. Heyer*, 5 Denio, 629, 1 Denio, 483, is an important case on this point. The defendants, merchants in New York, ordered from the plaintiffs in England a case of hardware. It arrived April 7, when the bill of lading was delivered and the freight paid. On the 9th the goods were entered at the custom-house, and carried from the ship to the public store. They were placed there by the custom-house officers, because the consignees had neglected to pay the duties and obtain a permit to land the goods, and were not there under any of the warehousing provisions of the revenue laws. While there, and before the duties were paid, the defendants became insolvent, and the plaintiffs demanded of them the goods. They refused to deliver them, and afterwards paid the duties and removed the goods to their own store. Chancellor *Walworth* was of the opinion that the entry, without payment of the duties, was not a termination of the *transitus*, although he thought that if they had been placed in a public store under the revenue warehousing system, the right of the vendor would be gone. See also, as to this last point, *Strachan v. Knox*, Court of Sessions, Scotland, 19 F. C. 253, *Brown on Sales*, 536.



taking of them from him by the government, or delivery of them by him to the government, can restore the lien of the seller ; for that ceased entirely as soon as they came into possession of the buyer.

### F. *Of Constructive Delivery of the Goods.*

In general, wherever a carrier enters into a new arrangement with the consignee, by which the carrier agrees to hold the goods as the property of the consignee and at his disposal, this is a termination of the transit.<sup>1</sup> All acts in reference to any such question must be open to explanation by coexisting circumstances. And the general question may be stated thus. Taking all the facts together, was the carrier, the warehouse-man, or wharfinger, or any other person having the actual possession of the goods, at the time of the intended stoppage *in transitu*, acting as the agent of the seller, or of the buyer ; for if of the latter, the transit was terminated.<sup>2</sup> And a question having arisen in such a case,

<sup>1</sup> Thus, in *Whitehead v. Anderson*, 9 M. & W. 518, 534, *Parke, B.*, said : " A case of *constructive* possession is, where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him." In this case the court doubted whether the act of marking, or taking samples, or the like, without any removal of any part of the goods from the possession of the carrier, even though done with the intention of taking possession, would amount to a *constructive* possession, unless it was accompanied by circumstances showing that it was intended that the carrier should keep possession of the goods as the agent of the vendee, and that he assented to the same. See also cases cited in next note.

<sup>2</sup> Thus, in *Allan v. Gripper*, 2 Crompt. & J. 218, 2 Tyrw. 217, the goods were conveyed by a carrier by water, and deposited in the carrier's warehouse, to be delivered thence to the purchaser or his customers, as they should be wanted, in pursuance of an agreement to this effect between the carrier and the purchaser. This was the usual course of business between them. It was held that the carrier became the warehouseman of the purchaser, upon the goods being deposited there, and that the vendor's right of stoppage was gone. The case was likened to *Foster v. Frampton*, 6 B. & C. 107, 9 Dowl. & R. 108, where the vendee desired the carrier, for his own convenience, to let the goods remain in his warehouse until he received further directions, and also took home samples of the goods ; but before the bulk was removed he became insolvent, and it was held, that the right of stoppage was gone. See also *Rowe v. Pickford*, 1 J. B. Moore, 526. *Scott v. Pettit*, 3 B. & P. 469, was decided on the same principle.

whether the intention of either party could be put in by evidence and considered, when that intention had not been communicated to the custodian, it was held, by the majority of the court, but against the important dissent of Lord Abinger, that such intention was admissible.<sup>1</sup>

Among other modes of terminating the transit by constructive delivery, may be mentioned a delivery of the key of the vendor's warehouse to the purchaser;<sup>2</sup> or a receipt by the vendor of rent for the use of his warehouse;<sup>3</sup> or demanding and marking the goods by an agent of the buyer, at the inn which they had reached at the end of the journey;<sup>4</sup> or the seller's permitting the goods to be resold, and marked by the second buyer;<sup>5</sup> and we apprehend that permitting a resale would alone be sufficient.

Any delivery of the goods to an agent of the buyer authorized to receive them, will terminate the transit or otherwise, according to the purpose for which they are received. If to be still sent forward to the buyer, the receiver is only an agent to continue the transit;<sup>6</sup> but if they are to rest where received, and remain there

Goods were sent from Manchester *directed* to the purchasers at London; but, in pursuance of a general order from the buyer to the seller, they were sent to the warehouse of the buyer's packer, and by the warehouse-man were booked to the buyer's account, and the warehouse-man unpacked them. The *transitus* was held at an end when the goods reached the warehouse. In *Wentworth v. Outhwaite*, 10 M. & W. 436, goods were sold by a merchant in Hull to a Mr. Weatherall of Mickley Mills, a place about thirty miles from Leeds. They were forwarded by railway to Leeds, and there placed in the warehouse of the defendants. The custom was for the warehouse-men, when goods arrived for the vendee, to give him notice, and he then sent his teams for the goods. Held, that the warehouse-men were the agents of the vendee, and a delivery at their warehouse was a delivery to him, so as to terminate the *transitus*. See also *Dodson v. Wentworth*, 4 Man. & G. 1080. But in this country, under a precisely similar state of facts, it has been decided otherwise. *Covell v. Hitchcock*, 23 Wend. 611, 20 Wend. 167.

<sup>1</sup> *James v. Griffin*, 2 M. & W. 623.

<sup>2</sup> Per Lord *Kenyon*, C. J., in *Ellis v. Hunt*, 3 T. R. 464, 468. See also *Wilkes v. Ferris*, 5 Johns. 335; *Chappel v. Marvin*, 2 Aikens, 79.

<sup>3</sup> See *ante*, p. 487, note 2.

<sup>4</sup> *Ellis v. Hunt*, 3 T. R. 464.

<sup>5</sup> *Stoveld v. Hughes*, 14 East, 308.

<sup>6</sup> Thus, in *Buckley v. Furniss*, 15 Wend. 137, 17 id. 504, a party ordered a quantity of merchandise, directing it to be forwarded to an intermediate place. After it arrived it was delivered to a common carrier employed by the purchaser,

subject to the final disposal of the buyer, and, therefore, could not be held as on their way to him, such a reception would terminate the transit.<sup>1</sup>

What possession of the vendee terminates the transit, has also been considered, in reference to constructive possession. An erroneous view of this subject seems to have prevailed for a while, in consequence of certain phrases indicating that actual and personal possession alone could have this effect, which were used inconsiderately by judges of high authority. We apprehend, however, that no court would now hold that constructive possession might not have the full effect of actual possession.<sup>2</sup>

but before it reached its final destination the vendor stopped it. Held, that there had been no delivery to the vendee. See also *Mills v. Ball*, 2 B. & P. 457; *Coates v. Railton*, 6 B. & C. 422; *Edwards v. Brewer*, 2 M. & W. 375; *Hause v. Judson*, 4 Dana, 7; *Cabeen v. Campbell*, 30 Penn. State, 254; *Harris v. Pratt*, 17 N. Y. 249; *Aguirre v. Parmelee*, 22 Conn. 473. And the law is the same where the delivery is to a packer appointed by the buyer. *Hunt v. Ward*, 3 T. R. 467; *Loeschman v. Williams*, 4 Camp. 181. But if the warehouse of the packer is used by the buyer as his own, the law is otherwise. *Scott v. Pettit*, 3 B. & P. 469; *Tucker v. Humphrey*, 4 Bing. 516; *Leeds v. Wright*, 3 B. & P. 320.

<sup>1</sup> *Dixon v. Baldwin*, 5 East, 175; *Valpy v. Gibson*, 4 C. B. 837; *Leeds v. Wright*, 3 B. & P. 320; *Biggs v. Barry*, 2 Curtis, C. C. 259.

<sup>2</sup> It was once said, by Lord Mansfield, in *Hunter v. Beal*, cited in *Ellis v. Hunt*, 3 T. R. 466, that goods must come to the *corporal touch* of the vendees, in order to terminate the transit. This expression, as applicable to the facts of the case, was perfectly correct, but it gave rise to the idea that the vendee could not take constructive possession of the goods. Lord Kenyon also seems to have been of the opinion that an actual possession was necessary. In *Wright v. Lawes*, 4 Esp. 82, he used the following language: "I once said, that, to confer a property on the consignee, a corporal touch was necessary. I wish the expression had never been used, as it says too much." We have seen that a delivery to an agent of the vendee, if the goods are not to be forwarded, but to remain with the agent subject to the final disposition of the vendee, is a termination of the transit. And so is a delivery on the wharf of the vendee, though the vendor claim to stop them before the vendee takes possession of them. *Sawyer v. Joslin*, 20 Vt. 172. The goods, in this case, were shipped at Troy, N. Y., directed to the purchaser at Vergennes, Vt. They were landed upon the wharf at Vergennes, half a mile from the purchaser's place of business. The wharf was the place where his goods were usually landed, and it was not customary for the wharfinger, or the carrier, or any one of them, to have any care of the goods after they were landed; but the consignee was accustomed to transport the goods from the wharf to his place of business, as was also the custom with other persons having goods landed there. The goods, while on the wharf, were not subject to any lien for

G. *Whether the Consignee may hasten his own Possession.*

A question has arisen whether a consignee, by taking possession of the goods prematurely, can terminate the transit and with it the right of the seller, earlier than it would otherwise cease. And it has been held, that he can not.<sup>1</sup> But it must be difficult to lay down any rule on this subject, which would not depend greatly upon the particular facts of a case. For, on the one hand, no consignee should be permitted by a fraudulent anticipation of delivery to deprive the buyer of a right which he was preparing to exercise with all due diligence and in the usual and proper way; and on the other hand, it cannot be maintained that a consignee may not fairly exert himself to the utmost to hasten the arrival of goods which he wishes to use in his business, or that the consignor, when he sends them, has a certain time allowed him for his stoppage *in transitu*, which is predicated upon the usual course of transit, and is independent of the buyer's position. It

freight or charges. It was held, that a delivery on the wharf was a constructive delivery to the vendee, and that the right of stoppage was gone when the goods were landed. The cases on this point were thus classified by *Hall, J.*, who delivered the opinion of the court: "The cases cited and relied upon by the plaintiff's counsel, where the transit was held not to have terminated, will, I think, all be found to fall within one or the other of the following classes: 1. Cases in which it has been held that the right of stoppage existed, where the goods were originally forwarded on board of a ship chartered by the vendee. 2. Where the delivery of the goods to the vendee has been deemed incomplete, by reason of his refusal to accept them. 3. Where goods remained in the custom-house, subject to a government bill for duties. 4. Where they were still in the hands of the carrier, or wharfinger, as his agent, subject to the carrier's lien for freights. 5. Where the goods, though arrived at their port of delivery, were still on ship-board, or in the hands of the ship's lighterman, to be conveyed to the wharf. 6. Where the goods had performed part of their transit, but were in the hands of a middleman, to be forwarded on by other carriers."

<sup>1</sup> *Holst v. Pownal*, 1 Esp. 240. The ship, in this case, arrived at Liverpool on the 9th of June, but being obliged to perform quarantine she was ordered back to a place called Hoylake, for that purpose. The same day the assignee of the vendee went on board and claimed the cargo, opened some chests of oranges, and put two persons on board to maintain possession. On the 17th of June the goods were claimed by an agent of the vendor. On the 18th the quarantine was ended and the ship came into harbor, and on the 19th the cargo was delivered to the assignees. Lord *Kenyon* held, that, the voyage not being completed, the right of stoppage remained, and the defendant had no right to claim possession till the end of the voyage.

has never been supposed that a seller would lose his right at a certain time, when the goods ought to be in the hands of the buyer, whether they were so or not.<sup>1</sup>

<sup>1</sup> *Wright v. Lawes*, 4 Esp. 82; *Mills v. Ball*, 2 B. & P. 457, 461; *Oppenheim v. Russell*, 3 B. & P. 42, 54. In *Holst v. Pownall*, 1 Esp. 240, there was a bill of lading which may have influenced Lord Kenyon's decision, as in *Wright v. Lawes*, *supra*, where there was no bill, he decided that the vendee could take possession of the goods before they arrived. But Mr. Baron Parke, in *James v. Griffin*, 2 M. & W. 623, 633, speaking of these two cases, said: "It is somewhat difficult to understand how a bill of lading, which is only a contract between the vendee and shipper for the carriage, can make any difference." See also *Jones v. Jones*, 8 M. & W. 431; *Foster v. Frampton*, 6 B. & C. 107. In *Wood v. Yeatman*, 15 B. Mon. 270, one Davis, of Tennessee, went to Philadelphia and bought goods of the plaintiff with the fraudulent design of never paying for them. The goods were packed in boxes, marked with his name and address, as well as with the names of the vendors, and forwarded by the usual conveyance to Jacob Forsythe, Jr., a commission merchant at Pittsburg, on their way to Tennessee. At Pittsburg they were attached by a creditor of Davis for a debt of \$1,000. Davis, who was there, induced the defendant to relieve the goods from this attachment, by accepting a draft at sixty days for the amount of the debt, which was cashed by Forsythe, and the attachment discharged. As an indemnity, Yeatman exacted that the goods should be delivered to the house of Forsythe & Co., and by them forwarded to him at Nashville, and refused to accept the draft unless this was done. The goods were therefore delivered over to that house and by them shipped to a firm in Smithland, an intermediate port, where goods are usually reshipped up the Cumberland to Nashville. On the 21st of October, 1851, Yeatman attached these goods at Smithland, on allegations of fraud against Davis, and subsequently Wood caused attachments to be levied on the same goods, asserting his right to stop them *in transitu*. The court held that the acts of Davis were tantamount to an actual assumption of possession and delivery to Yeatman, and that the right of the consignor to stop them *in transitu* had ceased. It was held, in *Jackson v. Nichol*, 5 Bing. N. C. 508, that although a reception by the vendee of the goods while on the journey would operate as a termination of the transit, yet that a mere demand by the vendee without any delivery would not have this effect. So in the late case of *Secomb v. Nutt*, 14 B. Mon. 324. The vendor, at Wilmington, N. C., shipped goods to the house of Marsh & Rowlett of New Orleans, to be by them forwarded to the vendee at Cincinnati. The vendee directed M. & R. to sell the goods if a certain price could be obtained, and they accordingly sold a portion, but being unable to obtain the required price for the rest, shipped it to the vendee. It was contended that the order given to M. & R. put an end to the transit, and that it changed the character of M. & R. from that of mere forwarders to that of special agents for the vendee, and that the latter, by giving the order, assumed a control, and acquired a dominion over the whole which was equivalent to taking possession. But the court held that although the transit had ceased as to the goods sold, yet the vendor had a right to stop the others. It was

### H. *Of the Delivery of a Part of the Goods.*

Whether a delivery of a part of the goods terminates the transit as to all, has also been questioned. We should lay down the rule thus: If the purchase be made by a contract consisting of severable parts, and not in itself entire, a delivery of one of these parts would not terminate the transit as to the others. If the contract were entire, the delivery of a part would terminate the transit as a delivery of the whole, unless it could be shown that the intention was to sever that part and deliver it by itself.<sup>1</sup>

admitted that the vendee might have taken possession before the end of the journey, but the court said: "The intermediate act of the vendee must be such as produces an actual and substantial or physical effect upon the condition and destination of the goods."

<sup>1</sup> The first case in which this subject was broached was *Slubey v. Heyward*, 2 H. Bl. 504. The sale was of 7,061 bushels of wheat, the whole of which was entered by the consignees at the custom-house, and 800 bushels taken away before the vendor attempted to stop the remainder. The court held that there had been a delivery of the whole, there being no intention on the part of the consignees to separate the part taken from the rest. And in *Hammond v. Anderson*, 4 B. & P. 69, the delivery of part was held to be a delivery of the whole. The vendor and vendee lived in the same town, and the goods (bacon in bales) lay at the wharf of a third person. They were sold for an entire price to be paid for by a bill at two months. The vendee, having received an order for the delivery of the property, went to the wharf, and weighed the whole, and took away part. See also *Jones v. Jones*, 8 M. & W. 431. In *Wentworth v. Outhwaite*, 10 M. & W. 436, several parcels of goods were purchased under one entire contract from a party at Hull, by the consignee living at Mickley, about thirty miles from Leeds. A part—two packages—was forwarded by the railroad to Leeds, and arrived there. One of these was taken by the consignee to Mickley, and the other seized by the sheriff at the suit of a creditor of the vendee. Some other parcels, comprised in the same contract, which were forwarded by water carriage to Borough-bridge, were stopped *in transitu*. The sheriff brought an action of trover to recover these parcels, on the ground that the right of the vendors was gone, there being a part delivery, but the court held that the transit had not terminated. In *Tanner v. Scovell*, 14 M. & W. 28, goods were shipped for London, and were landed at a wharf and entered on the wharfinger's books in the *consignor's* name. The vendee had obtained a delivery order, under which he had received and sold the greater part. The court held that as to the rest the right of stoppage existed. So in *Hanson v. Meyer*, 6 East, 614, the vendor sold all his starch lying at the warehouse of a third party at so much per cwt. The warehouse-man was directed to weigh and deliver it to the vendee. It was held that a part having been weighed and delivered, the right of stoppage existed as to the residue. See also *Simmons v. Swift*, 5 B. & C. 857. *Miles v. Gorton*, 2 Crompt. & M. 504, was an

I. *Of the Effect of the Bill of Lading on this Right.*

The effect of the bill of lading upon the right of the seller to stop the goods *in transitu*, is very important. It was once quite uncertain; but we apprehend that the course of adjudication and the principles which the law merchant would bring to bear upon this question, enable us to state with some certainty the American law on the subject.

The bill of lading may be regarded as only a receipt which the carrier gives for the goods; and then it would have but little effect upon the right of stoppage. But the law merchant regards it as much more than this; as an important maritime document; and we should say as a muniment of title generally, carrying property with it, and as itself a negotiable instrument. This the common law does not allow. It seems to have settled down, after some fluctuation, into the doctrine, that it is not, properly speaking, negotiable, but only *quasi* negotiable.<sup>1</sup> If by this is meant that the assignee cannot bring an action on it in his own name, but must bring the action in the name of his assignor, who is the original consignor, and that the action so brought shall be subject to no other defences than could be made if it were brought in the name of the assignee, there is no great practical harm in it. But the English courts have doubted, to say no more, whether a transfer

action by the assignees of a bankrupt against the vendor. The goods sold consisted of twelve pockets of Kent hops and ten pockets of Sussex. An entire price was given. The goods remained in the warehouse of the vendors. The vendee resold the ten pockets of Sussex hops, and delivered them to the sub-vendee. The other twelve remained in the warehouse of the vendors till after the vendee became bankrupt. Held that on these the vendor had not lost his lien. See also *Dixon v. Yates*, 5 B. & Ad. 313; *Bunney v. Poyntz*, 4 B. & Ad. 568. In *Secomb v. Nutt*, 14 B. Mon. 224, a part of the goods was sold while on the journey by the order of the consignee. Held that the original vendor had a right to stop the residue. See also *Buckley v. Furniss*, 17 Wend. 504. There is a *dictum* of Mr. Justice Taunton, in *Betts v. Gibbens*, 2 A. & E. 57, 73, 4 Nev. & M. 64, 76, to the effect that a partial delivery is *primâ facie* a delivery of the whole. But the correctness of this doctrine has been denied. See *Tanner v. Scovell*, 14 M. & W. 28, 37.

<sup>1</sup> Though bills of lading have sometimes been called negotiable instruments, as in *Berkley v. Watling*, 7 A. & E. 29, *Bell v. Moss*, 5 Whart. 189, 205, yet the law may now be considered as settled that they are only *quasi* negotiable. See *Gurney v. Behrend*, 3 Ellis & B. 622, 25 Eng. L. & Eq. 128, 136, and cases cited *ante*, p. 193, n. 1.

by indorsement of the bill of lading for value, was, or operated as, an actual transfer of the goods.<sup>1</sup>

<sup>1</sup> *Evans v. Marlett*, 1 *Ld. Raym.* 271, 12 *Mod.* 156, 3 *Salk.* 290, is one of the earliest cases in which this subject is mentioned. *Holt*, C. J., there said: "The consignee of a bill of lading has such a property that he may assign it over." *Shower* also said that it had been adjudged so in the Exchequer. Lord *Mansfield*, in *Wright v. Campbell*, 1 *W. Bl.* 628, 4 *Burr.* 2046, said: "If the goods are *bonâ fide* sold by the factor *at sea* (as they may be, where no other delivery can be given), it will be good, notwithstanding the statute of 21 Jac. 1, c. 19, the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered: and the owner can never dispute with the vendee; because the goods were sold *bonâ fide* and by the owner's own authority." The court, being of opinion that there were circumstances tending to show that the assignment was fraudulent, ordered a new trial to determine that fact. See also *Caldwell v. Ball*, 1 *T. R.* 205; *Hibbert v. Carter*, 1 *T. R.* 745. The leading case on the subject is *Lickbarrow v. Mason*. The facts of this case were as follows: Messrs. Turing and Son, merchants at Middlebourg, shipped the goods in question for Liverpool by the order and on the account of one Freeman of Rotterdam, and drew bills of exchange on him for the price. The master of the ship signed four bills of lading for the goods in the usual form unto order or assigns; two of which were indorsed by Turing and Son in blank, and sent to Freeman together with an invoice of the goods. Another bill was retained by Turing and Son, and the remaining one kept by the master. The two bills of lading which were sent to Freeman he handed over, with the invoice, in the same state in which he received them, to the plaintiffs, that they might sell the goods on his account, and drew bills of exchange upon them for nearly the amount. Both sets of bills were accepted by Freeman and the plaintiffs respectively, but before the ship arrived Freeman became a bankrupt, and absconded, and Turing and Son sent another bill of lading to the defendants, who thereby obtained possession of the goods from the master. The Court of King's Bench, 2 *T. R.* 63, decided that the indorsement of the bills of lading being *bonâ fide*, and for a valuable consideration to one who had no notice that the goods had not been paid for, operated as an actual transfer of the property, so as to divest the consignor of his right of stoppage *in transitu*. On appeal to the Exchequer Chamber, this decision was reversed by Lord *Loughborough*, 1 *H. Bl.* 357. The case was then removed into the House of Lords, where the judgment of the Exchequer Chamber was itself reversed and a *venire de novo* awarded. 2 *H. Bl.* 211, 5 *T. R.* 367. The able opinion of Mr. Justice *Buller*, before the House of Lords, is reported in 6 *East*. 21, note. On the second trial the jury found a special verdict, on which the Court of King's Bench declined giving any opinion, as it was understood that the case was to be carried up to the House of Lords; they stated, however, that they were of the same opinion as in the former case. 5 *T. R.* 683. If a writ of error was brought, it was probably abandoned, as no further report of the case appears. See also *Salomons v. Nissen*, 2 *T. R.* 674; *Haille v. Smith*, 1 *B. & P.* 563; *Jenkyns v. Usborne*, 7 *Man. & G.* 678, 699; *Pennell v. Alexander*, 3 *Ellis & B.* 283, 24 *Eng. L. & Eq.* 132. In



Bills of lading so generally contain the word "assigns," or the word "order," that we assume this to be a part of them. These

*Newsom v. Thornton*, 6 East, 17, 41, Lord *Ellenborough*, C. J., said: "A bill of lading indeed shall pass the property upon a *bonâ fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended. *But it cannot operate further.*" And Mr. Justice *Lawrence* in the same case added: "In *Lickbarrow v. Mason*, some of the judges did indeed liken a bill of lading to a bill of exchange, and considered that the indorsement of the one did convey the property in the goods in the same manner as the indorsement of the other conveyed the sum for which it was drawn. But in the Exchequer Chamber there was much argument to show that, *in itself*, the indorsement of a bill of lading was no *transfer* of the property, though it might operate as other instruments as *evidence* of the transfer." And in *Gurney v. Behrend*, 3 Ellis & B. 622, 25 Eng. L. & Eq. 128, 136, Lord *Campbell*, C. J. said: "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bonâ fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented." In this country it is well settled that the bill of lading is *quasi* negotiable only. Thus in *Everett v. Saltus*, 15 Wend. 474, *nom.* *Saltus v. Everett*, 20 Wend. 267, the master of a vessel in which goods were shipped, fraudulently reshipped them at an intermediate port, and obtained a bill of lading for them which he transmitted to his agents, who sold the goods and indorsed over the bill of lading to the vendee, who acted *bonâ fide*. Held, that the original owner was entitled to the goods. See also, generally, *Stubbs v. Lund*, 7 Mass. 453; *Peters v. Ballistier*, 3 Pick. 495; *Rowley v. Bigelow*, 12 Pick. 307, 314; *Stanton v. Eager*, 16 Pick. 467; *Chandler v. Sprague*, 5 Met. 306, 308; *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 445; *Chandler v. Belden*, 18 Johns. 157; *Walter v. Ross*, 2 Wash. C. C. 283; *Ryberg v. Snell*, 2 Wash. C. C. 294; *Dawes v. Cope*, 4 Binn. 258; *The Schooner Mary Ann Guest*, *Olcott*, Adm. 498, 1 Blatchf. C. C. 358; *Winslow v. Norton*, 29 Maine, 419. But if the bill of lading be transferred and indorsed by way of pledge to secure the consignee's debt, the consignor does not lose his right to stop the goods *in transitu*, but holds it subject to the rights of the pledgee. That is, he may enforce his claim to hold the surplus of the value of the goods, after the pledgee's claim is satisfied; and he holds this surplus to secure the debt of the consignee's to him. And if the consignee has pledged some of his own goods together with those of the consignor, the latter would have a right to insist upon the appropriation of all the consignee's own goods towards the claim of the pledgee, before any of the goods contained in the bill of lading. *In re Westzintus*, 5 B. & Ad. 817

words, alone, would not suffice to make them negotiable instruments. But the nature and use of the instrument, and the mercantile practice under it, and the unreasonableness of depriving a consignee and buyer of all power of effectually selling his goods "to arrive," or when they are at sea (which can only be done by transfer of the bill of lading); all these considerations lead us to regret that there has not been a fuller recognition of the negotiability of the bill of lading. In despite of Lord Loughborough's elaborate argument,<sup>1</sup> it seems to be very nearly as desirable that the bill of lading should be considered in all respects negotiable, as that bills and notes to order should be.

The bill of lading is made sometimes to the consignor or his order, or his assigns; sometimes to the consignee or his order or assigns. If transferred without indorsement, we should say it carried no title to the property; the mere possession of it not having any more effect than the mere possession of unindorsed promissory paper.<sup>2</sup> And if indorsed specially, the indorsee would be bound by the limitation, and any one to whom he transferred it would be bound also.<sup>3</sup>

But if it were made to the consignee or his order or assigns, and the consignor sent it to him; or if it were made to the consignor and his order or assigns, and the consignor indorsed it either in blank or to the consignee, and sent it to him in that state, then we should say that the consignor or seller had put into the hands of the consignee or buyer a muniment and evidence of property, transferable in itself, and justifying a third party without notice in believing that the consignee had a right to make an absolute sale of the goods to him.<sup>4</sup> We therefore conclude that a consignee who

The consignor is only bound to tender to the pledgee the amount of the specific advances made on the particular bill of lading, and is not liable for a general balance of account. *Spalding v. Ruding*, 6 Beav. 376.

<sup>1</sup> *Lickbarrow v. Mason*, 1 H. Bl. 357.

<sup>2</sup> *Stone v. Swift*, 4 Pick. 389; *Walter v. Ross*, 2 Wash. C. C. 283; *Tucker v. Humphrey*, 4 Bing. 516, per *Parke*, J.

<sup>3</sup> *Barrow v. Coles*, 3 Camp. 92. So held also in the case of a bill of exchange, *Lloyd v. Howard*, 15 Q. B. 995, 1 Eng. L. & Eq. 227. See also the authorities cited in a note to this case, p. 230, 231.

<sup>4</sup> A delivery is also necessary. *Buffington v. Curtis*, 15 Mass. 528; *Low v. De Wolf*, 8 Pick. 101; *Allen v. Williams*, 12 id. 297, 300; *Gurney v. Behrend*, 3 Ellis & B. 622, 25 Eng. L. & Eq. 128.

sells the goods for value "to arrive" and indorses over the bill of lading, confers upon the purchaser a title and property which destroys the right of the seller of the goods to stop them *in transitu*.

To this rule, however, there is this important qualification. If the party buying from the consignee knows that the sale is in fraud of the original seller, it is voidable by that seller of course. And if he knows that the consignee is, or is about to become, insolvent, this knowledge would, we think, have the same effect. That is, it would be regarded as conclusive evidence of a knowledge on his part of the consignee's fraud. But if the consignee was aware of his own insolvency, and even of an intended stoppage *in transitu*, and sold the goods to prevent this, unless the purchaser had some knowledge, or adequate means of knowledge, of this fraud, he should not, on the general principles of sale and transfer, be affected by it.<sup>1</sup> It is not enough that the sub-vendee have notice or knowledge that the goods have not been paid for, but he must have notice or knowledge of circumstances which rendered the bill of lading not properly assignable.<sup>2</sup>

It has already been remarked that a consignee who has not this power, has in fact no practical power of sale; and the interests of commerce would be importantly interfered with by any such deprivation. For if he could, without this power, make a contract for the sale of the goods while at sea, this contract would be subject to his ultimate power of receiving the goods; and, this being uncertain, the consignee could not get his pay. The contract to sell would be avoided, so far as the sale was concerned, by a stoppage *in transitu*, which should prevent the consignee from getting the goods into his possession and power. And no prudent merchant

<sup>1</sup> *Salomons v. Nissen*, 2 T. R. 674.

<sup>2</sup> *Cuming v. Brown*, 9 East, 506, Lord *Ellenborough*, C. J., in this case stated the law as follows: If the plaintiff "had known that the consignee had been in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that, being accepted, it was not likely to be paid; in that case the interposition of himself between the consignor and the consignee, in order to assist the latter to disappoint the just rights and expectations of the former, would have been an act done in fraud of the consignor's right to stop *in transitu*, and would, therefore, have been unavailable to the party taking an assignment of the bill of lading under such circumstances, and for such purpose." See also *ante*, p. 507, note 3.

would pay down his money or give his negotiable paper on any such contingency. But it would be otherwise, as every day's practice shows, if the consignee could make a present and effectual sale of the goods, with actual transfer of the property in them, by his indorsement and transfer of the bill of lading. And we cannot doubt that the principles of the law merchant would give him this power.

If the consignee be a factor merely, he has the goods only to sell them for his principal; and, therefore, has no authority to pledge them.<sup>1</sup> But if the consignor has sent to his factor the usual and unrestricted bill of lading, has he not clothed him with the *indicia* of authority, and can he be permitted to deny the authority itself? This question has been somewhat agitated both in this country and in England. As the result of adjudication, there and here, it seems to be settled that a factor cannot pass the property of the goods by his indorsement and transfer of the bill of lading, by way of pledge to a party who did not know that the goods were not the factor's.<sup>2</sup>

<sup>1</sup> This point was first decided in the case of *Paterson v. Tash*, briefly reported 2 Stra. 1178, as follows: "It was held by *Lee, C. J.*, that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt." It is stated in *Abbott on Shipping*, p. 541, that there is reason to suppose that this case was incorrectly reported. See also the argument of counsel in *Newbold v. Wright*, 4 Rawle, 195. However this may be, the law, as there stated, is now the well-settled doctrine of England. *Daubigny v. Duval*, 5 T. R. 604; *Solly v. Rathbone*, 2 M. & S. 298; *Graham v. Dyster*, 6 M. & S. 1; *Baring v. Corrie*, 2 B. & Ald. 137, 143; *Kuckein v. Wilson*, 4 B. & Ald. 443; *Fielding v. Kymer*, 2 Brod. & B. 639; *Queiroz v. Trueman*, 3 B. & C. 342; *Greenway v. Fisher*, 1 Car. & P. 190; *Williams v. Barton*, 3 Bing. 139; *Stierneld v. Holden*, 4 B. & C. 5; *Selleck v. Smith*, 3 Bing. 603. And in this country the law is the same. *Kinder v. Shaw*, 2 Mass. 398; *Odiorne v. Maxcy*, 13 Mass. 178; *Hoffman v. Noble*, 6 Met. 68, 74; *Evans v. Potter*, 2 Gallis. 13; *Van Amringe v. Peabody*, 1 Mason, 440; *Kennedy v. Strong*, 14 Johns. 128; *Buckley v. Packard*, 20 Johns. 421; *Rodriguez v. Heffernan*, 5 Johns. Ch. 417, 429; *Holton v. Smith*, 7 N. H. 446; *Newbold v. Wright*, 4 Rawle, 195; *Hewes v. Doddridge*, 1 Rob. Va. 143; *Bowie v. Napier*, 1 McCord, 1; *Benny v. Rhodes*, 18 Mo. 147; *Benny v. Pegram*, 18 Mo. 191; *Warner v. Martin*, 11 How. 209, 226; *Skinner v. Dodge*, 4 Hen. & Munf. 432; *Howard v. Macondray*, 7 Gray, 516.

<sup>2</sup> *Martini v. Coles*, 1 M. & S. 140; *Shipley v. Kymer*, id. 484; *Newsom v. Thornton*, 6 East, 17. The case of *Wright v. Campbell*, 4 Burr. 2046, was decided on the ground that the transaction was a sale, and so within the scope of the factor's authority, and is not, therefore, contrary to the other decisions, as has been sometimes supposed.

Statutes in England,<sup>1</sup> and similar laws in some of our States,<sup>2</sup> protect the transferee in such a case. And this legislation is in con-

<sup>1</sup> 4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39.

<sup>2</sup> These statutes enact generally that any consignee, agent, or factor, having possession of merchandise with authority to sell the same, or having possession of any bill of lading, permit, certificate, or order for the delivery of merchandise with the like authority, shall be deemed the true owner thereof so as to give validity to the sale, disposition, or pledge of such merchandise, as security for any advances, negotiable paper, or other obligations given on faith thereof. Maine R. S. (1857), tit. iii. ch. 31; Gen. Stats. Mass. ch. 54; Rev. Stat. R. I. (1857), ch. 116; N. Y. R. S. (1830), ch. 179, p. 203; (1852, Denio & Tracy's ed.), part. ii. ch. iv. tit. V.; Laws of Penn. (1834), ch. 470; Ohio Rev. Stat. (1844, Swan's ed.), 278. By the statutes of some of the States the pledgee cannot retain the merchandise if he had notice that the factor was not the true owner, before he made the advances for which the merchandise was pledged as security. But the fourth section of the 54th chapter of the General Statutes of Massachusetts provides that the pledge shall hold good, "if he makes such loans, advances and exchanges, in good faith and with probable cause to believe that the agent making the deposit or pledge had authority so to do, and was not acting fraudulently against the owner of such merchandise," and that he "shall acquire the same interest in, and authority over, such merchandise and documents as he would have acquired thereby if the agent had been the actual owner thereof, notwithstanding he had notice of such agency." If the merchandise is pledged to secure *antecedent* advances, the pledgee acquires no other right or interest in the pledge than was possessed, or could have been enforced by the agent or factor at the time of making. Maine R. S. ch. 31, § 2; Gen. Stats. Mass. ch. 54, § 5; Rev. Stat. R. I. (1857), ch. 116, § 3; N. Y. R. S. (1830), ch. 179, § 4; (1852, Denio & Tracy's ed.), part ii. ch. iv. tit. v.; Laws of Penn. (1834), ch. 470, § 4. Very few questions which have arisen under these statutes have been decided. In New York the third section of the act of 1830 provides that the factor shall be deemed owner, etc., "so far as to give validity to any contract made by such agent with any other person, for sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument, or other obligation in writing, given by such other person upon the faith thereof." In *Jennings v. Merrill*, 20 Wend. 9, it was held, under this section, that where goods were in the possession of the factor, a transfer of the invoice to the defendants for indorsements to be made on the faith of it upon the paper of the factor, came within the statute. The statute of New York, 1830, was intended to protect advances and dealings made on the faith of ownership, and not on the faith of the possession of the paper title or the evidences of title. It was, therefore, held in a case where this question arose, that where a person advanced money to a factor on the security of certain goods, he knowing at the time that they were the property of another person, he was not entitled to the protection of the statute. *Stevens v. Wilson*, 6 Hill, 512, affirmed 3 Denio, 472. See also *Zachrisson v. Ahman*, 2 Sandf. 68, 75. In this last case it was also held, that a general clerk

formity with the practice of the merchants of continental Europe,<sup>1</sup> and, as we think, with sound policy and the true principles of the law merchant.

It is always to be remembered that the mere possession of the bill of lading does not give a property in the goods, unless it be a lawful possession, or unless the transferee is fully justified in believing it to be a lawful possession and has paid for the goods on that supposition.<sup>2</sup> Hence, if a master, who usually or perhaps always has one copy of the bill of lading for his own use and guidance, which he is not expected or indeed authorized to hand to any other person, do in fact give it to the consignee or other person, even if it be so indorsed as to be transferable by delivery, it confers no right or title upon the receiver of it.<sup>3</sup> But even such transfer, where the transferee has an equitable title to the goods otherwise, may strengthen it. And a mere deposit of the bill of lading, even if unindorsed, will create a lien on the goods for the amount paid on the security of the deposit; and this lien will prevail against the right of the seller to stop the goods *in transitu*,<sup>4</sup>

of a merchant, part of whose duty it was to prepare and present bills of lading for signature on shipping property of his principal, had not such contrl of the bills of lading as constituted him a factor. An important case has also been decided under the first section of the same statute, which provides that "every person in whose name any merchandise shall be shipped shall be deemed the true owner, so far as to entitle the consignee of such merchandise to a lien," etc. *Covill v. Hill*, 4 Denio, 323. It was there held, that this section was confined to cases where the goods are shipped by the owner or under his authority, in the name of another, and, therefore, where a person intrusted a quantity of lumber to another to be shipped, in the name of the bailor, to certain parties, and the bailee was to direct them to sell it in the name of the bailor, and remit the proceeds to him, it was held, that the bailee, by shipping the goods in his own name, could not confer upon the consignees any better title than he himself had. For decisions under the English statutes, see *Monk v. Whittenbury*, 2 B. & Ad. 484; *Fletcher v. Heath*, 7 B. & C. 517; *Blandy v. Allan*, 3 Car. & P. 447; *Taylor v. Trueman*, *Moody & M.* 453; *Baring v. Corrie*, 2 B. & Ald. 137; *Evans v. Trueman*, 1 *Moody & R.* 10; *Close v. Holmes*, 2 *Moody & R.* 22; *Phillips v. Huth*, 6 *M. & W.* 572; *Taylor v. Kymer*, 3 B. & Ad. 320.

<sup>1</sup> See 1 Bell, Comm. B. 3, pt. 1, ch. 4, § 4, art. 412, p. 388-394, 4th ed.

<sup>2</sup> See *Gurney v. Behrend*, 3 Ellis & B. 622, 25 Eng. L. & Eq. 128, 136; *Covill v. Hill*, 4 Den. 323.

<sup>3</sup> *Walter v. Ross*, 2 Wash. C. C. 283.

<sup>4</sup> *Nathan v. Giles*, 5 Taunt. 558. In *Walter v. Ross*, 2 Wash. C. C. 283, 289, Mr. Justice *Washington* states the law as follows: "The possession of a bill of lading to order, not indorsed; a promise by the shipper to indorse it, or to send a

but it does not destroy that right, for the seller, by discharging this lien, may take possession of the goods.

While the transfer of an indorsed bill of lading for value, by one authorized to transfer it, will thus pass the property in the goods, it does not follow that the property cannot be vested in the consignee free from all lien, without the bill. For if one orders goods, and they are sent to him, but the consignor takes a bill of lading to himself and this is never indorsed nor transferred by him, yet if the master delivers the goods to the party who ordered them, the consignor has lost his right of stoppage;<sup>1</sup> and this even if a bill of exchange or a note, which was given for the goods, was dishonored.

In a late case in England, a merchant purchased goods on his own credit, for another person. Duplicate bills of lading were sent to the merchant, who forwarded an account of the sale to the person for whom he bought, and drew on him for the amount. The bill of exchange was accepted. He thereupon indorsed one of the bills of lading and sent it to this person. Soon after the arrival of the vessel, hearing of the insolvency of the person to whom the bill of lading was sent, he indorsed the other bill of lading in blank, and demanded the goods of the master. No other demand had been made. It was held that he was entitled to stop the goods *in transitu*. It was admitted by the court that if the first bill of lading had been indorsed to an innocent third person for a valuable consideration, the right of stoppage would have been gone.<sup>2</sup>

bill of lading; or perhaps even a letter of advice, stating the shipment to be to a particular person, may, as between these parties, and where the consideration is paid, give to the consignee an equitable title, sufficient to repel the right of the consignor to countermand, and even to defeat the legal right of the holder of the bill of lading, with notice of the circumstances."

<sup>1</sup> *Coxe v. Harden*, 4 East, 211.

<sup>2</sup> *The Tigress*, Brow. & L. Adm. 38.

## SECTION IV.

## HOW FAR THE EXERCISE OF THIS RIGHT MUST BE ADVERSE TO THE BUYER.

It is often said that the exercise of the right of stoppage by the seller must be adverse, or in opposition to, the buyer.<sup>1</sup> But we doubt whether this is quite accurate.<sup>2</sup> If a consignee who hears of goods sent to him and knows he cannot pay for them, sends word to this effect to the consignor, that he may stop them on their way, so that they may not pass into his assets, and the consignor, availing himself of the information, complies with the request, we should be unable to say, on any sound principle, that this might not be a lawful stoppage.<sup>3</sup> The cases to which the rule, that this

<sup>1</sup> *Siff'ken v. Wray*, 6 East, 371, 380, per *Ld. Ellenborough*, C. J.; *Ash v. Putnam*, 1 Hill, 302; *Abbott on Shipping*, 514.

<sup>2</sup> In *Naylor v. Dennie*, 8 Pick. 198, 204, the court said: "We understand this doctrine to mean no more, than that the right of stopping *in transitu* cannot be exercised under a title derived from the consignee; not that it shall be exercised *in hostility* to him; for we find it laid down in the same case of *Lane v. Jackson*, and in *Feise v. Wray*, 3 East, 93, that the consignment may be refused, and that even by the direction of the consignee, some stranger may be appointed to take possession of the goods for the consignor, though he may be absent, and if he consents afterwards, the rescinding of the sale is complete."

<sup>3</sup> See *Atkin v. Barwick*, 1 Stra. 165, 10 Mod. 432, *Fortesc. 353*; *Salte v. Field*, 5 T. R. 211; *Richardson v. Goss*, 3 B. & P. 119; *Bartram v. Farebrother*, 4 Bing. 579, 1 Dan. & Ll. 42; *Scholfield v. Bell*, 14 Mass. 40. In *Dixon v. Baldwin*, 5 East, 175, the goods were taken from the possession of the agents of the vendees by the vendor on giving an indemnity, he claiming a right to stop the goods *in transitu*. The court held that the *transitus* was at an end, but that the vendors were entitled to the goods, there being evidence that the vendee intended to resign his claim to them before becoming insolvent. *James v. Griffin*, 1 M. & W. 20, 2 M. & W. 623, is an important case on this subject. The vessel with the goods on board arrived at the port of London. The captain pressed the consignee to have them landed immediately. The consignee, therefore, sent his son with directions to have the goods landed at a wharf where he was accustomed to have goods for him landed, and kept until he could take them away for his customers. At the same time he told his son that he would not meddle with the goods, that he did not intend to take them, and that the vendor ought to have them. The goods were landed at the wharf and there stopped by the vendor. The assignees of the bankrupt brought an action against the wharfinger. The court held that the goods belonged to the vendor. In the opinion of the court the case turned on the point whether the acts done amounted to a taking possession of the goods by



right of the seller must be adverse to the buyer, is usually applied, are really very different, and come under a different principle. If

the bankrupt as owner, and the intention of the bankrupt was to govern. To prove this intention the declarations to the son were considered most material, though they were not communicated to the defendants. In *Smith v. Field*, 5 T. R. 402, it was said that though a contract of sale might be rescinded by the consent of vendor and vendee, yet where the vendee wished to return the goods, but the vendor commenced a suit upon the contract of sale, and attached the goods in the hands of the packer as the property of the vendee, this would be considered as an election by the vendor not to rescind. In *Ash v. Putnam*, 1 Hill, 302, the right of the vendor to take back his goods was put on the ground that the sale was rescinded, and so in most cases. In *James v. Griffin*, 2 M. & W. 623, it seems to be considered as a right of lien, though *Parke, B.*, says it is unimportant to determine the point. See also *Naylor v. Dennie*, 8 Pick. 198; *Grout v. Hill*, 4 Gray, 361. In *Lane v. Jackson*, 5 Mass. 157, the consignees, merchants in Boston, had ordered goods to be shipped them on credit by the plaintiffs, merchants in London. Before the arrival of the vessel the consignees became insolvent, and while in this condition received advice of the shipment, and one of the bills of lading. This they assigned by deed to one Bourne, directing him to receive the goods on their arrival, and dispose of them for the use of the plaintiffs, in consideration of the said consignees being unable to pay for them. Bourne covenanted to do the same. On the day the ship arrived, Bourne went on board, presented the bill of lading indorsed to him, and demanded the goods, which the master agreed to deliver unless he was legally prevented. All these acts were done without the knowledge or direction of the plaintiffs. The same day on which the ship arrived, the goods were attached by the defendant, a deputy sheriff, at the suit of a creditor of the consignees. They were subsequently replevied by the plaintiffs. The court admitted that an insolvent consignee might, before he received the goods, disagree to the consignment, and the assent of the consignor would be presumed, unless, within a reasonable time after notice given, he declared his dissent, or neglected to give notice of his assent. And that if the goods arrived before notice could be given to the consignor, any person, at the request of the consignee, might receive and take care of them, until the consignor had notice, and that an intermediate attachment would not defeat this right. For the insolvent consignee having refused to receive them, the goods are *in transitu*, and may be seized by the consignor while they continue *in transitu*. And on his giving notice of his assent, within a reasonable time, to the disagreement of the consignee, the contract is rescinded *ab initio*, and nothing ever passed by it to the consignee." But the court were of opinion that these principles did not apply. They said: "But this case is different. The consignees undertake here to assign the goods, and authorize a sale thereof for the use of the consignor. This assignment is not a disagreement, but an affirmation of the contract: and we cannot presume that the consignor would consent to the appointment of a factor, with power to receive and sell. The authority of the factor is derived from the consignee, and necessarily supposes an interest in the goods. In our opinion the

a seller sends his goods to a buyer and the buyer receives them, and then seeks to restore them to the seller, or even if they are brought to the buyer and he refuses to take them, and then the question comes whether the seller can profit by this return or refusal of the buyer, it is a question of *rescission*, and not of *lien*; and we have already seen that the right of stoppage *in transitu* belongs to *lien* and not to *rescission*. If the goods were actually received by the buyer, the seller's *lien* is at an end; and so we think it is if they come actually within his power and immediate reach, and he declines to take hold of them. And then comes the question whether he and the seller can agree to rescind the sale, and give back to the seller those goods, to which by the common law the assignees of the buyer are entitled, leaving to the seller only his dividend with other creditors. This is not, we repeat, a question of *lien*, and therefore not strictly a question of stoppage *in transitu*. So far as it is a question of sale and *rescission*, it must be difficult to find a reason why goods which have come to the bankrupt lately, or very recently, should be returned to the seller, and goods received earlier only make a common fund for all the creditors.<sup>1</sup>

plaintiffs cannot support this action upon the ground that they had never parted with their property by the supposed disagreement of the consignees." And if the goods are not attached, in such a case, the assignees of the bankrupt are entitled to them. *Siffken v. Wray*, 6 East, 371.

<sup>1</sup> After the goods have come into the possession of the vendee, it is clear that he cannot by sending them back give preference to one creditor over another, particularly where the intention to return them is not completed till after the bankruptcy. *Harman v. Fishar*, 1 Cowp. 117, Lofft, 472; *Barnes v. Freeland*, 6 T. R. 80. See also *Alderson v. Temple*, 4 Burr. 2235; *Siffken v. Wray*, 6 East, 371. In *Heinekey v. Earle*, 8 Ellis & B. 410, the vendee was in embarrassed circumstances when the goods arrived, and desired that they should not be landed, but they were put into his warehouse, and he wrote to the vendors that he should warehouse the goods for them if his business should stop. The vendors then wrote demanding the goods, and the vendee replied that he had consulted his solicitor, who informed him that they could not be returned. The property of the vendee was afterwards assigned to trustees, and the keys of the warehouse delivered to them. The court held that the transit was ended when the goods were first put in the warehouse, and that there was no valid and mutual *rescission* of the contract of sale. But see *Grout v. Hill*, 4 Gray, 361.

## SECTION V.

## WHAT INSOLVENCY WILL GIVE THIS RIGHT.

It seems to be held that if the seller knew that the buyer was insolvent when he sent the goods, he cannot stop them afterwards.<sup>1</sup> This seems reasonable enough. But if the seller knew the insolvency, it is impossible to suppose that he would send them, in good faith, unless on some special ground of security, or at least of belief of payment. And if the transaction were honest, and this security failed, and the belief passed away, we know not why the seller might not stop the goods. It has, however, been held that to give the vendor the right to stop the goods *in transitu*, the insolvency must take place between the time of the sale and the exercise of the right of stoppage. But we are not without much doubt whether this can be laid down as a positive and universal rule. For if there be such a rule, the mere fact of insolvency at the time of the sale, whether known or unknown to the vendor, would destroy the right of stoppage.<sup>2</sup>

<sup>1</sup> Buckley v. Furniss, 15 Wend. 137.

<sup>2</sup> This question seems to have been first raised in Rogers v. Thomas, 20 Conn. 53. Storrs, J., there said: "The remaining inquiry respects the time when such insolvency must occur, in order to confer this right. On this point, we are of opinion, that it is not sufficient it exists when the sale takes place, but that it must intervene between the sale and the exercise of such right. It is well settled that after the sale, and before the vendor has taken any steps to forward the property to the vendee, the former has a lien upon it, by virtue of which he may, on the occurrence of the insolvency of the latter, retain the goods in his possession as a security for the price. This is a strictly analogous right to that of stopping them after they have been forwarded, and while they are on their way to the vendee, and depends on the same principles. And it may be here remarked, that the cases decided on the subject of that right of lien, confirm the views which we have expressed as to the meaning of insolvency as applied to the right of stoppage, after the *transitus* has commenced. The same equitable principle, which authorizes a retention of the possession in the one case, and a recovery of it in the other, would seem to authorize the latter, where the insolvency occurred after the sale and before the forwarding of the property. The right of stopping it after the *transitus* has commenced, may not, therefore, be limited to the case where insolvency occurs after it has left the possession of the vendor, but it may extend to cases where it occurred at any time after the sale. However that may be, we are clear that it must occur after the sale. In favor of this position there is the same argument, from an entire absence of authority against it, as was derived

Only a vendor can stop the goods ; for no one else has a lien for the price. But a foreign merchant, who, in compliance with orders from here, sends goods, the price of which abroad he has paid or is responsible for, is a seller or consignor within the requirement of the law of stoppage *in transitu*.<sup>1</sup> And so is one who sends goods to be sold by the consignee on the joint account of the sender and the consignee.<sup>2</sup> And an alien enemy who sent goods to England under a British license was there permitted to stop them.<sup>3</sup> But one who is only a surety for the consignee to the consignor, in whatever form, whether as indorser, guarantor, or otherwise, cannot, as we have already said,<sup>4</sup> have any lien on the goods, and therefore has no right to stop them ; even if they are sent through his hands. It might be in such a case, that he might otherwise obtain indemnity or security on the goods, as by attachment, if the circumstances permitted it ; but not by a stoppage *in transitu*. Even if the sender has a lien on the goods, if it be not the lien of the seller for the price, he cannot stop them ; as if the sender had worked upon them and had a lien for the wages or payment for what he has done.<sup>5</sup> Indeed, no one

from that source on the point which we have just considered ; and it applies with equal force. We find no decided case, in which the right in question has been sanctioned, excepting where the insolvency occurred subsequent to the sale. And although the language of the courts may sometimes seem to import, that the right exists, irrespective of the time when the insolvency took place, it is quite plain, that, applying their expressions to the cases they were considering, and which did not involve this point, they were not intended to have that construction. But in most of the decided cases on this subject, it will be seen that their language is most unequivocal, and in terms limits the right of stoppage to cases of bankruptcy or insolvency, occurring while the goods are *in transitu*, and of course after the sale." In this case the vendee was insolvent at the time of the sale, and had been so for a long time previous. Precisely the same state of facts existed, in this respect, in *Buckley v. Furniss*, 15 Wend. 137, 17 id. 504, but the vendor there was allowed to exercise his right, though it was thought that if he had known the facts it would be different. This case was cited by counsel in *Rogers v. Thomas*, but was not noticed by the court. See also *Conyers v. Ennis*, 2 Mason, 236, where no notice was taken of this distinction. It was unnecessary, however, to consider it, as there had been a delivery to the vendee. And see *Biggs v. Barry*, 2 Curtis, C. C. 259.

<sup>1</sup> See *ante*, p. 485, n. 2.

<sup>2</sup> *Newsom v. Thornton*, 6 East, 17.

<sup>3</sup> *Fenton v. Pearson*, 15 East, 419.

<sup>4</sup> See *ante*, p. 485, n. 1.

<sup>5</sup> *Sweet v. Pym*, 1 East, 4.

can exercise the right of stoppage *in transitu* who has not a property in the goods.

Nothing but the insolvency of the buyer gives this right to the seller; and indeed it may be called a principle of maritime law, that a consignor cannot vary or interfere with a consignment once made, except on the ground of insolvency.<sup>1</sup> But this need not be legal or formal bankruptcy or insolvency; it is enough if the buyer cannot pay his debts.<sup>2</sup> The seller who stops the goods

<sup>1</sup> *Snee v. Prescott*, 1 Atk. 245; *The Constantia*, 6 Rob. Adm. 321.

<sup>2</sup> In *Rogers v. Thomas*, 20 Conn. 54, Mr. Justice Storrs, on the meaning of the phrase insolvency, said: "The cases on this subject generally mention insolvency as one of the conditions on which the right of stoppage *in transitu* accrues; but they are wholly silent as to what constitutes such insolvency; and, therefore, its sense, as thus used, is to be gathered from the circumstances of the cases. For it is a term which is used with various meanings. In a technical sense, it denotes the having taken the benefit of an insolvent law; in the popular sense, a general inability to pay debts; and, in a mercantile sense, a stoppage of payment, or failure in one's circumstances, as evinced by some overt act. That a technical insolvency is sufficient to authorize the exercise of the right of stoppage *in transitu*, has always been conceded. That it is not indispensable for that purpose, is equally clear. Mr. Smith, in his *Compendium of Mercantile Law*, p. 549, n., expresses his belief, that merchants have very generally acted as if the right to stop goods was not postponed till the occurrence of insolvency in the technical sense, and pertinently adds: 'The law of stoppage *in transitu* is as old, it must be recollected, as 1670, on the 21st of March, in which year *Wiseman v. Vandeputt* was decided; so that if *insolvency* is to be taken in a technical sense, the law of stoppage *in transitu* has been varying with the varied enactments of the legislature regarding it.' That stoppage of payment amounts to insolvency, for this purpose, is assumed in many of the cases. Lord *Ellenborough*, in *Newsom v. Thornton*, 6 East, 17, places the right of the vendor to stop the property on the 'insolvency' of the consignee, where there had been only a stoppage of payment by the vendee, when notice was given to the carrier, by the vendor, to retain the goods. In *Vertue v. Jewell*, 4 Camp. 31, the terms used were, 'stopped payment.' See also *Dixon v. Yates*, 5 B. & Ad. 313. We have been able to find no case in which the right of stoppage *in transitu* has been either sanctioned or attempted to be justified on the ground of the insolvency of the vendee, where there was not a technical insolvency, or a stoppage of payment, or failure in circumstances, evidenced by some overt act; and Mr. Blackburn, in his *Treatise of the Contract of Sale*, p. 130, where this subject is very minutely examined, says, that there seems to have been no such case; and adds, that although the text-books and *dicta* of the judges do not restrict the use of the term 'insolvent,' or 'failed in his circumstances,' to one who has stopped payment, there must be great practical difficulty in establishing the actual insolvency of one who still continues to pay his way; and as the carrier obeys the stoppage *in transitu* at his peril, if the con-

takes this risk on himself. The buyer, if not insolvent, can pay the price, or if they were sold on credit, secure it, and then claim the goods. And if the seller stopped them maliciously, or without actual belief of insolvency on good grounds, he would doubtless be answerable for any damages the buyer should sustain thereby. If the goods were to be paid for by acceptances or notes, and the buyer is willing to accept the bills or sign the notes, and is not insolvent, the seller cannot stop the goods.<sup>1</sup> But if a compliance with the terms of the sale is refused by the buyer, then the seller may refuse to deliver the goods, or, what is the same thing, stop them *in transitu*. It is in fact insolvency so far as he is concerned.

signee be in fact solvent, it would seem no unreasonable rule to require, that at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act. Mr. Smith, in his work which has been mentioned, clearly favors the same view. Comp. Merc. Law, 130, n. Hence, it appears that the authorities and text writers furnish no support to the claim, that a mere general inability to pay debts, unaccompanied with any visible change in the circumstances of the debtor, constitutes insolvency, in such a sense as to confer the right of stoppage *in transitu*."

The rule generally laid down is, that a person is insolvent when he is not in a condition to pay his debts in the usual and ordinary course of trade and business. *Shone v. Lucas*, 3 Dowl. & R. 218; *Bayly v. Schofield*, 1 M. & S. 338; *Biddlecombe v. Bond*, 4 A. & E. 332; *Thompson v. Thompson*, 4 Cush. 127, 134. In *Secomb v. Nutt*, 14 B. Mon. 324, on the question whether the vendee was insolvent, the court said: "To establish insolvency it is not necessary to prove that he is not able to pay a cent, or any particular sum, but it is sufficient to show that he is unable to pay his debts. The true meaning and effect of the preference given to the vendor, while the goods sold on a credit are *in transitu*, is that he is relieved from the necessity of a race for priority, and of sharing with general creditors the proceeds of goods sold by himself. To save him from this scramble it is sufficient to show with reasonable certainty, that is, with probability, that the vendee is embarrassed and not able to make full or general payment of his debts. And it would seem that the vendee's own admission of the fact to his vendor would be sufficient to authorize the latter to act upon it, and should, unless disproved, sustain his claim to stop the goods *in transitu*." In *Hays v. Mouille*, 14 Penn. State, 51, the vendee was indebted some \$60,000, and his assets were only \$26,000. His creditors were watching for the goods which the vendor had sold, and attached them while *in transitu*. The court held that the jury were warranted in finding from these facts that the vendee was insolvent. See also *Naylor v. Dennie*, 8 Pick. 198, 205.

<sup>1</sup> *Walley v. Montgomery*, 3 East, 585. See also *The Constantia*, 6 Rob. Adm. 321.

The seller's right to stop the goods cannot be defeated by any bargain between the consignee and his assignee;<sup>1</sup> or by any claim, or lien, or attachment of any other person.<sup>2</sup> It may be necessary for the seller to discharge the claim, as if it be a lien for freight;<sup>3</sup> but even this is not necessary, where the attachment is by a creditor of the buyer or consignee; for the seller's lien takes precedence. But if the goods have arrived at the journey's end, and are only prevented by the attachment from removal by the consignee, this may prevail, on the ground that the transit has ended and the lien gone.<sup>4</sup>

## SECTION VI.

### HOW THE RIGHT OF STOPPAGE MAY BE EXERCISED AND ENFORCED.

The insolvency of the buyer alone, however complete, or however manifested, will not operate as a stoppage *in transitu*.<sup>5</sup> The goods must be actually *stopped*, in some way which the law recognizes as adequate, by the seller or his authorized agent. It seems to have been supposed formerly, that an actual taking possession by the seller was requisite to complete this stoppage. That is

<sup>1</sup> See *ante*, p. 508, note 1.

<sup>2</sup> *Smith v. Goss*, 1 Camp. 282; *Le Ray De Chaumont v. Griffin*, cited 15 Wend. 144; *Buckley v. Furniss*, 15 Wend. 137; *Covell v. Hitchcock*, 23 Wend. 611; *Naylor v. Dennie*, 8 Pick. 198; *Hause v. Judson*, 4 Dana, 7; *Secomb v. Nutt*, 14 B. Mon. 324; *Wood v. Yeatman*, 15 B. Mon. 270; *Parker v. M'Iver*, 1 Des. 274; *Sawyer v. Joslin*, 20 Vt. 172. But a conveyance by an insolvent debtor of goods, in trust, to pay the debt of a creditor, will not defeat an attachment made before he assents to the transfer; for the goods still remain the property of the debtor, and as such are liable to attachment. *Lane v. Jackson*, 5 Mass. 157, 163.

<sup>3</sup> See *ante*, p. 495, D.

<sup>4</sup> In *Hitchcock v. Covill*, 20 Wend. 167, *Nelson, C. J.*, seems to have been of this opinion though the case was decided on another ground. If the goods have arrived at their place of destination, but before they are delivered to the vendee, they are attached by a creditor of his, and he takes no step to obtain the possession of them, the right of the vendor still remains. *Naylor v. Dennie*, 8 Pick. 198. But if, while they are attached, he takes such possession as he is able to, prior to the assertion of the right of the vendor, the *transitus* will be held to have terminated. *Ellis v. Hunt*, 3 T. R. 464.

<sup>5</sup> *Haswell v. Hunt*, cited 5 T. R. 231; *Ellis v. Hunt*, 3 T. R. 464; *Scott v. Pettit*, 3 B. & P. 469, 471; *Mottram v. Heyer*, 5 Denio, 629.

now, however, not necessary ; or, at least, not in all cases ; although actual possession should always be taken if possible, and as soon as possible. And this right of taking possession is so complete that it justifies any mode of getting possession that is not criminal.<sup>1</sup> But, as the goods may be secured against stoppage by passing into the constructive possession of the buyer, so they may be effectually stopped by the seller's acquiring a constructive possession of them. This is usually and properly done by giving notice to the carrier of the title and purpose of the seller, and forbidding him to deliver the goods to the buyer, and requiring him to give them up to the seller or his agent, or to hold them subject to his order. This notice should be given to the person who has actual possession of the goods.<sup>2</sup> If given only to the servant of the carrier, a question might arise whether this would be sufficient. We may suppose, for example, that a parcel sent by a carrier to a buyer had been delivered by the carrier to his porter, who was about to enter the buyer's home with it, when ordered by the seller's agent, of whom he knew nothing, not to deliver it. We should say, however, even in so extreme a case, that the seller had succeeded in stopping the goods, and if there had been no negligence on his part, and the porter still went on and delivered the parcel to the buyer, that the seller would have a lien on them, and might, if they were not paid for, bring trover for them against the assignees of the buyer.

If notice is given to the principal and not to the servant, a different question may arise ; and here it seems to be held, that a notice to the principal carrier is not sufficient, unless given in such way and at such a time, as to enable the principal carrier to send word to his servant not to deliver the goods.<sup>3</sup>

<sup>1</sup> *Snee v. Prescott*, 1 Atk. 245, 250, per Lord Chancellor *Hardwicke*.

<sup>2</sup> *Litt v. Cowley*, 2 Marsh. 457, 7 Taunt. 169 ; *Holst v. Pownal*, 1 Esp. 240. In *Bell v. Moss*, 5 Whart. 189, notice given to the assignees of the consignee was held to be sufficient. But in *Mottram v. Heyer*, 5 Denio, 629, 1 id. 483, the demand was made of the vendee before the goods were delivered to him, and while they were in the custody of the custom-house officers. This was held insufficient. In such a case notice should be given to the officers of the custom-house. *Northey v. Field*, 2 Esp. 613.

<sup>3</sup> *Whitehead v. Anderson*, 9 M. & W. 518, is an important case on this point. Timber was sent from Quebec, to be delivered at Port Fleetwood in Lancashire. Notice of stoppage was given to the ship-owner at Montrose, while the goods were on their voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the



If a notice be properly given to the carrier, it is his duty to comply with it. And if he does not, but actually delivers the goods to the buyer after such notice, this delivery does not defeat the right of the seller to stop the goods, if his demand was in all respects legal. The possession of the buyer is then unlawful, and will be held to be by construction of law the possession of the seller. And the carrier will be responsible to the seller for all the injury he may sustain.<sup>1</sup> Or, if the buyer becomes insolvent, and the goods pass into the possession of his assignees, the seller may bring an action of trover against the assignees.<sup>2</sup> And if the carrier, in whose hands the goods are duly stopped, delivers them to the buyer by mistake, the latter does not obtain such possession of the goods as will defeat the lien of the seller.<sup>3</sup> If, however, both parties claim the goods of the carrier, as of a shipmaster, for example, he should ask an indemnity from the person whose claim seems to him best founded; if refused, he may ask an indemnity from the other party, and on that deliver it. There is no legal obligation imposed on either party to give such indemnity, but if circumstances warranted the master in asking it, and it was refused, and thereupon he refused to deliver the goods, the rightful claimant would doubtless recover them, or their value, but nothing, we think, by way of cost or damages for the detention. If the

vendor. This was held not to be sufficient. *Parke, B.*, said: "To make a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or if given to the principal, whose servant has the custody, it must be given, as it was in the case of *Litt v. Cowley*, 7 Taunt. 169, at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to re-vest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible, from the distance and want of means of communication, to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is, to use reasonable diligence to prevent the delivery; and in the present case such diligence was used."

<sup>1</sup> *Wood v. Jones*, 7 Dowl. & R. 126; *Stokes v. La Riviere*, cited 3 East, 397; *Hunter v. Beal*, cited 3 T. R. 466. See, however, *Mills v. Ball*, 2 B. & P. 457, 462, per Lord *Alvanley*, C. J.

<sup>2</sup> *Bohdingk v. Inglis*, 3 East, 381; *Litt v. Cowley*, 2 Marsh. 457, 7 Taunt. 169; and cases *passim*.

<sup>3</sup> *Litt v. Cowley*, 2 Marsh. 457, 7 Taunt. 169.

goods are in the custom-house, the seller may take possession by entering them as his own and paying or securing the duties.<sup>1</sup>

What the consignor may do personally, he may do by an authorized agent.<sup>2</sup> And if the demand be made by one who acts as agent but without authority, a subsequent adoption and ratification by the seller, will have the effect of a previous authority, provided this be made before the goods are demanded by the buyer.<sup>3</sup> If made afterwards, it is said, it cannot give validity to the stoppage.<sup>4</sup>

On the continent of Europe generally, the right of stoppage *in transitu* is controlled, or rather made unnecessary, by the principle derived from the civil law, already referred to, which permits any creditor to take out of the debtor's possession the goods which he sold; if they can be identified and separated, and the parcels have not been opened for sale, or the goods altered. But in France, after some conflict, it seems to be settled that the law of stoppage *in transitu* is almost the same as our own.<sup>5</sup> There is, however,

<sup>1</sup> *Nix v. Olive*, Abbott on Shipping, 538; *Ex parte Walker*, 1 Cooke's B. L. 394.

<sup>2</sup> *Holst v. Pownal*, 1 Esp. 240; *Whitehead v. Anderson*, 9 M. & W. 518; *Donath v. Broomhead*, 7 Barr. 301; *Mottram v. Heyer*, 5 Denio, 629. If an agent has it in his power to stop the goods but neglects to do so, he is liable in an action by the principal against him. *Howatt v. Davis*, 5 Munf. 34.

<sup>3</sup> *Wood v. Jones*, 7 Dowl. & R. 126; *Newhall v. Vargas*, 13 Maine, 93. See also *Nicholls v. Le Fauvre*, 2 Bing. N. C. 81; *Bailey v. Culverwell*, 8 B. & C. 448; *Bartram v. Farebrother*, 4 Bing. 579. If one unauthorized takes possession of the goods before they reach the vendee, the question is *quo animo* he does it, whether as agent of the consignor, or of the vendee. Per *Parks, B.*, *James v. Griffin*, 1 M. & W. 20, 29.

<sup>4</sup> *Bird v. Brown*, 4 Exch. 786. The persons who stopped the goods in this case were not even the general agents of the vendors. But in *Newhall v. Vargas*, 13 Maine, 93, a ratification, after the goods were demanded by the administrator of the consignee, who had died insolvent, was held to be effectual. The principle upon which the court proceeded in the case of *Bird v. Brown*, seems to us to be the more correct. It is that the act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies. The Court said: "In the present case, the stoppage could only be made during the *transitus*. During that period the defendants, without authority from Illins, made the stoppage. After the *transitus* was ended, but not before, Illins ratified what the defendants had done. From that time the stoppage was the act of Illins, but it was then too late for him to stop. The goods had already become the property of the plaintiffs, free from all right of stoppage."

<sup>5</sup> See *ante*, p. 480, n. 3.

one provision of its code, not often called for, perhaps, in practice, but so manifestly just and reasonable, that it should be adopted here. It is that the estate, or the assignees of the purchaser of goods which the seller has stopped and taken into his possession, shall be fully indemnified for all the costs and charges which they have properly incurred on account of them.<sup>1</sup> Indeed, this is only an unusual application of the same principle which the law merchant already applies to stoppage *in transitu* in reference to freight.

<sup>1</sup> Code de Commerce, art. 579. "In case of stoppage *in transitu*, the vendor shall be bound to indemnify the estate of the insolvent for all advances for freight or transportation, commission, insurance, or other charges, or to pay the sums due for these expenses if they have not been discharged."

## CHAPTER XI.

## OF COLLISION.

## SECTION I.

## GENERAL RULES.

COLLISION is a very common accident in harbors, and not very rare at sea. The rule in this country is, that the party in fault must suffer his own loss and compensate the other party for what loss he may sustain.<sup>1</sup> But if neither be in fault, the loss rests where it falls.<sup>2</sup> If both are substantially in fault, the loss also rests

<sup>1</sup> The *Scioto*, *Daveis*, 359; The *Woodrop-Sims*, 2 Dods. 83; *Reeves v. Ship Constitution*, *Gilpin*, 579; The *Sappho*, 9 Jur. 560. See also cases *infra* generally.

<sup>2</sup> When a collision takes place by inevitable accident, without blame being imputable to either party, as where it is occasioned by a storm, or any other *vis major*, the misfortune must be borne by the party on whom it happens to light. In this, the civil law, the common law, and the Maritime law of Europe, of England, and of this country, agree. Dig. 9. 2. 9; *Consulat de la Mer*, par Boucher, 200-203; *Pardessus*, *Droit Com.* tome iii. 652; The French Code de Commerce, art. 407; *Valin*, *Ord. de la Marine*, liv. 3, tit. 7, art. 10, vol. 2, p. 177; *Emerigon*, c. 12, § 14; (see, however, the *Laws of Oleron*, art. 15, and The Ordinance of *Wisbuy*, arts. 29, 49, 50, and 65; *Boulay Paty*, *Cours de Droit Com. Mar.* tit. 12, s. 6, vol. 4, p. 493;) The *Woodrop-Sims*, 2 Dods. 83; The *Celt*, 3 Hagg. Adm. 328, note; *Jameson v. Drinkald*, 12 J. B. Moore, 148; The *Catherine of Dover*, 2 Hagg. Adm. 145, 154; The *Shannon & The Placidia*, 7 Jur. 380, s. c. *nom.* The *Shannon*, 1 W. Rob. 463; The *Thornley*, 7 Jur. 659; The *Ebenezer*, 2 W. Rob. 206; The *Itinerant*, 2 W. Rob. 236; The *Scioto*, *Daveis*, 359; *Reeves v. Ship Constitution*, *Gilpin*, 579; *Stainback v. Rae*, 14 How. 532; The *Eliza & Abby*, 1 Blatchf. & H. Adm. 435; The *Moxey*, *Abbott*, Adm. 73. See also The *Ligo*, 2 Hagg. Adm. 356; *Steamboat Co. v. Whilldin*, 4 Harring. Del. 228; *Cummins v. Spruance*, 4 Harring. Del. 315; The *Brig Veruma v. Clark*, 1 Texas, 30; *Myers v. Perry*, 1 La. Ann. 372; *Duggins v. Watson*, 15 Ark. 118; *Fashion v. Wards*, 6 McLean, C. C. 152. Dr. *Lushington*, in The *Virgil*, 7 Jur. 1174, 2 W. Rob. 201, defines an inevitable accident to be "that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill." See also The *Loch-*

where it falls, by the rules of the common law.<sup>1</sup> If it cannot be as-  
 libo, 3 W. Rob. 310, 318, 1 Eng. L. & Eq. 651; *The Europa*, 2 Eng. L. & Eq.  
 557; *The England*, 5 Notes of Cases, 170; *The John Buddle*, 5 Notes of Cases,  
 387; *The Juliet Erskine*, 6 Notes of Cases, 633; *Union Steamship Co. v. New*  
*York Steamship Co.* 24 How. 307; *The Morning Light*, 2 Wallace, 550; *The*  
*Carrier Dove*, Brow. & L. Adm. 113; *The Argo*, Swabey, Adm. 462; *The*  
*Peerless*, Lush. Adm. 30; *The Sylph*, 4 Blatchf. C. C. 24; *The Brooklyn*, id.  
 365; *The Bridgeport*, 1 Bened. Adm. 65; *The Perseverance*, Holt, Rule of the  
 Road, 262. (We shall have frequent occasion to refer to cases reported in this  
 work, and shall cite it as Holt.) In the *Bolina*, 3 Notes of Cases, 208, it was held  
 that where there is no *prima facie* case of negligence and want of seamanship, and  
 the party proceeded against alleges inevitable accident, the burden is not on him  
 to prove it, but the party seeking indemnification must prove that the other party  
 was to blame. If a vessel performing a salvage service injures another, the in-  
 jury will generally be considered as unavoidable. *Stevens v. Steamboat S. W.*  
*Downs*, 1 Newb. Adm. 458. In *The Java*, U. S. D. C., Mass. 1867, *Lowell, J.*,  
 the Cunard Steamer *Java* came into collision with a schooner, about one o'clock  
 in the afternoon. It appeared that the school-ship *George M. Barnard*, a large  
 vessel, high out of water, was kept constantly moored during the winter months  
 near the edge of the channel in Boston Harbor, and leaving only a narrow passage  
 between her and East Boston, and a vessel the size of the *Java* could not pass  
 through this passage except at high water, and it was not customary for the  
 Cunard steamers to take it. The schooner had been towed from the wharves,  
 and was getting under way near the school-ship, when the steamer, rounding the  
 stern of the school-ship, ran into the schooner. The steamer at the time was  
 going slowly, and had good lookouts. Held, that the steamer had a right to  
 go inside the school-ship, and that the collision was an inevitable accident.

<sup>1</sup> *Luxford v. Large*, 5 Car. & P. 421; *Vanderplank v. Miller, Moody & M.*  
 169; *Lack v. Seward*, 4 Car. & P. 106; *Sills v. Brown*, 9 Car. & P. 601; *Han-*  
*dayside v. Wilson*, 3 Car. & P. 528, 530, per *Best, C. J.*; *Vennall v. Garner*, 1  
 Crompt. & M. 21, 3 Tyrw. 85; *Simpson v. Hand*, 6 Whart. 311; *Broadwell v.*  
*Swigert*, 7 B. Mon. 39; *Rathbun v. Payne*, 19 Wend. 399; *Barnes v. Cole*, 21  
 Wend. 188; *Kelly v. Cunningham*, 1 Calif. 365; *Myers v. Perry*, 1 La. Ann. 372;  
*Duggins v. Watson*, 15 Ark. 118; *Dunn v. McComb*, 11 La. Ann. 325. In the  
 case of *Dowell v. The Gen. Steam Nav. Co.* 5 Ellis & B. 195, 32 Eng. L. &  
 Eq. 158, Lord *Campbell, C. J.*, said: "According to the rule which prevails in  
 the Court of Admiralty, in a case of collision, if both vessels are in fault, the loss is  
 equally divided; but in a court of common law the plaintiff has no remedy if his  
 negligence, in any degree, contributed to the accident." See also *The Gen.*  
*Steam Nav. Co. v. Mann*, 14 C. B. 127, 26 Eng. L. & Eq. 339, 341. The ne-  
 gligence of the plaintiff, in order to preclude him from recovering, must be such  
 that the defendant could not, by ordinary care, have avoided the consequences of  
 it. *Butterfield v. Forrester*, 11 East, 60; *Bridge v. The Grand Junction Rail-*  
*way Co.* 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 545. Lord *Campbell*, in  
 the case of *Gen. Steam Nav. Co. v. Tonkin*, 4 Moore, P. C. 314, said that he  
 entirely concurred in the principle established in these cases. See also *Tuff v.*  
*Warman*, 2 C. B. N. s. 740.

certained where the fault lies, the rule may not be quite certain ; but there is reason for saying that in admiralty the loss will not rest where it falls, but be divided between the two vessels.<sup>1</sup> In admiralty the rule was once said to be, in the case where both are in fault, that the loss should be apportioned between the parties, meaning according to the degree or measure of the fault of each, if either decidedly preponderates ; but if they are equal, or nearly so, the whole damage is divided between both, without reference to their respective values. But it seems now to be determined by adjudication, that the loss shall be divided equally.<sup>2</sup> Still, the

<sup>1</sup> When the collision has evidently been caused by neglect, or the want of sufficient precaution, it is, perhaps, not yet settled whether the rule of equal apportionment should be applied, if the fault is inscrutable, and it is impossible to say which party is to blame. In *The Catherine of Dover*, 2 Hagg. Adm. 154, Sir *Chr. Robinson* made the following remarks to the Trinity Masters: "The result of the evidence will be one of three alternatives, either a conviction in your mind that the loss was occasioned by accident, in which case it must be sustained by the party on whom it has fallen ; or *a state of reasonable doubt as to the preponderance of evidence, which will have nearly the same effect* ; or third, a conviction that the party charged with being the cause of the accident is justly chargeable with the loss of this vessel according to the rules of navigation which ought to have governed them." The words in italics have, by a late writer on maritime law (*Flanders on Mar. Law*, p. 298), been supposed to determine, as the law of England, that where the fault is inscrutable, each shall bear his own loss. Whether the learned judge intended this construction to be put upon his words, is perhaps doubtful. See *Story on Bailments*, § 609. The better rule seems to be that the loss in such a case shall be equally divided. 1 *Bell's Com.* 579 ; *Pothier, Avarie*, n. 155 ; 1 *Emerig. Ass.* ch. 12, § 14. In *The Scioto, Daveis*, 359, Judge *Ware* lays down the rule in the broadest terms. He says, the rule of equal proportionment "seems to apply in three cases, first, where there has been no fault on either side ; second, where there may have been fault, but it is uncertain on which side it lies ; and third, where there has been fault on both sides." And the rule of equal apportionment has been adopted in the District Court of the United States for the District of Ohio. *Lucas v. Steamboat Swann*, 6 *McLean*, C. C. 282. See also *The Nautilus, Ware*, 2d ed. 529.

<sup>2</sup> Where both parties are to blame, the loss is equally apportioned between them, although one may be much more in fault than the other. *Vaux v. Sheffer*, 8 *Moore*, P. C. 75 ; *The De Cock*, 5 *Month. Law Mag.* 303, 2 *Law Reporter*, 311, 22 *Am. Jurist*, 464 ; *The Seringapatam*, 5 *Notes of Cases*, 61, 66, 2 *W. Rob.* 506, 3 *id.* 38 ; *The Sappho*, 9 *Jurist*, 560. In *Hay v. Le Neve*, 2 *Shaw's Scotch Appeal Cases*, 395, this question received a full and elaborate discussion, and a decision of the Court of Sessions that the ship most to blame should pay two thirds of the expenses, was reversed. See also *The Judith Randolph*, decided by Sir *James Marriott*, in 1789, cited in *Hay v. Le Neve, supra* ; *The Oratava*, 5

equity power of the Court of Admiralty might qualify this rule, where the fault was vastly greater on one side than the other.<sup>1</sup> This rule has been held not to apply when both parties are wilfully in fault.<sup>2</sup> And even at common law, it is said the jury must take "an equitable view" of the facts and circumstances.<sup>3</sup>

Generally, if a collision has happened, and one vessel has been

Month. Law Mag. 45; *The Victoria*, 3 W. Rob. 49; *The Montreal*, 24 Eng. L. & Eq. 580; *The Monarch*, 1 W. Rob. 21; *Gen. Steam Nav. Co. v. Tonkin*, 4 Moore, P. C. 314; *Lenox v. Winisimmet Co.* 1 Sprague, 160; *The Scioto*, Daveis, 359; *The Brig Rival*, 1 Sprague, 128; *Haskell v. The Kennedy*, U. S. D. C. Mass. April, 1857, not yet reported; *Allen v. Mackay*, 1 Sprague, 219; *The Nautilus*, Ware, 2d ed. 529; *Foster v. Schooner Miranda*, 1 Newb. Adm. 227, 6 McLean, C. C. 221; *Reeves v. Ship Constitution*, Gilpin, 579; *The Marcia Tribou*, 2 Sprague, 17; *O'Neil v. Sears*, 2 Sprague, 52. The rule has also been adopted by the Supreme Court of the United States. *The Schooner Catherine v. Dickinson*, 17 How. 170, 177; *Rogers v. Steamer St. Charles*, 19 How. 108; *Cushing v. The John Fraser*, 21 How. 184, 195. In the Southern District of New York the common-law rule formerly prevailed. *The Bay State*, Abbott, Adm. 235.

<sup>1</sup> Mr. Justice *Hopkinson*, in *Ralston v. The State Rights*, Crabbe, 22, was of the opinion that the rule would not apply when the faults of the parties were *egregiously* unequal. And in a case of similar circumstances, a strict application of the rule would tend to encourage oppression and wrong. There is, however, no case where a different rule of apportionment has been adopted.

<sup>2</sup> *Sturges v. Murphy*, U. S. C. C., New York, Boston Courier, Sept. 19, 1857. This case was taken to the Supreme Court on appeal, and it was there held on the evidence not to be a case of this nature. The rule of law above laid down, was not, however, doubted. *Grier, J.*, said: "Cases may occur in which two steamboats engaged in unlawful racing may recklessly or wilfully dash against each other; and the courts, treating them both as criminals, may refuse to sustain an action, or decide which was most to blame, leaving each to suffer the consequences of his own folly and recklessness." *Sturgis v. Clough*, 21 How. 451. See also *s. c. nom. The R. L. Maybey*, 4 Blatchf. C. C. 88.

<sup>3</sup> See *Smith v. Dobson*, 3 Scott, N. R. 336, 3 Man. & G. 59. Concerning the justice of the rule there is a great diversity of opinion. Lord *Denman*, speaking of it, in *De Vaux v. Salvador*, 4 A. & E. 420, said: "It grows out of an arbitrary provision in the law of nations, from views of general expediency, not as dictated by natural justice, nor possibly quite consistent with it." While Mr. Justice *Nelson*, in *The Schooner Catherine v. Dickinson*, 17 How. 170, 177, said of it: "Under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides in the navigation." *Cleirac* calls it a *judicium rusticum*. *Us et Costumes de la Mer*, 68. *Valin*, on the contrary, thinks the rule just, and the most equitable one which could be adopted. *Valin*, liv. 3, tit. 7, des *Avaries*.

guilty of some negligence, the burden is on her to prove that this negligence is not the cause of the collision,<sup>1</sup> and a plaintiff in a cause of collision must prove both care on his own part and want of it in the defendant.<sup>2</sup> Nor is it enough to show that the collision could not have been prevented at the moment, if it might have been by previous precautions.<sup>3</sup>

The ship that is not disabled is bound to render all possible assistance to the other, although that other may be alone in fault.<sup>4</sup> This duty is now enjoined by statute in England.<sup>5</sup>

It has been held, that in case of collision between two American vessels in a foreign port, the rights of the parties will depend, even

<sup>1</sup> *The Sch. Lion*, 1 Sprague, 40; *Clapp v. Young*, U. S. D. C. Mass. 6 Law Rep. 111; *Bulloch v. Steamboat Lamar*, U. S. C. C. Georgia, 8 Law Rep. 275; *Waring v. Clarke*, 5 How. 441, 465; *The Brig Emily*, Olcott, Adm. 132. See *Cushing v. The John Fraser*, 21 How. 184.

<sup>2</sup> *Carsley v. White*, 21 Pick. 254; *Drew v. Steamboat Chesapeake*, 2 Doug. Mich. 33; *Lane v. Crombie*, 12 Pick. 177; *Bulloch v. Steamboat Lamar*, *ut sup.*; *Sills v. Brown*, 9 Car. & P. 601; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420; *Kennard v. Burton*, 25 Me. 39; *Rathbun v. Payne*, 19 Wend. 399; *Marriott v. Stanley*, 1 Scott, N. R. 392; *Raisin v. Mitchell*, 9 Car. & P. 613; *Bridge v. Grand Junction R. Co.* 3 M. & W. 244; *Smith v. Dobson*, 3 Scott, N. R. 336, 3 Man. & G. 59; *Butterfield v. Forrester*, 11 East, 60; *Handaysyde v. Wilson*, 3 Car. & P. 528; *Vanderplank v. Miller*, Moody & M. 169; *Davies v. Mann*, 10 M. & W. 546; *Vennall v. Garner*, 1 Crompt. & M. 21, 3 Tyrw. 85; *Fashion v. Wards*, 6 McLean, C. C. 152; *The Bolina*, 3 Notes of Cases, 208; *The Steam-Tug Wm. Young*, Olcott, Adm. 38; *The Steam Ferry-Boat Relief*, *id.* 104; *The Columbus*, Abbott, Adm. 384.

<sup>3</sup> In the case of *The Virgil*, 7 Jur. 1174, 2 W. Rob. 201, 205, Dr. *Lushington* said: "If a vessel charged with having occasioned a collision, should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution, that would have rendered the accident less probable; it may undoubtedly be important that a voyage should be completed in the most speedy manner, but such speed must be combined with safety to other vessels sailing in an opposite course." See also *The Steamboat New York v. Rea*, 18 How. 223, 224; *The Clement*, 2 Curtis, C. C. 363; *Wakefield v. Steamer Governor*, 1 Clifford, C. C. 93.

<sup>4</sup> *The Celt*, 3 Hagg. Adm. 321. In this case it was held that a vessel, which did not render assistance after the collision, should pay costs, although she was in no respect otherwise in fault. See also *The Ericsson*, Swabey, Adm. 38; *The Despatch*, *id.* 138.

<sup>5</sup> 25 & 26 Vict. c. 63, § 33. See *The Orinoco*, Holt, 98; *The Mexican*, Holt, 130.



in an action in this country, upon the law of the place where the collision took place.<sup>1</sup>

But if a collision takes place on the high seas between vessels of different countries, the rules of the maritime law, and not those of either country, are to determine which vessel was in fault.<sup>2</sup>

By statute now in England, when it is made to appear to the Queen that the government of any foreign country is willing that the regulations for preventing collision which are in force in England shall apply to the ships of such country when beyond the limits of British jurisdiction, the Queen may direct that such regu-

<sup>1</sup> *Smith v. Condry*, 1 How. 28. The collision in this case took place in the port of Liverpool between two American ships. It was held that the defence that the vessel sued was under the charge of a licensed pilot, and this exonerated the defendant by the English law, was a valid defence. See also *The Peerless*, Lush. Adm. 30, 40. In *The Vernon*, 1 W. Rob. 316, the owners of a Norwegian vessel sued an English vessel for a collision which occurred off Dungeness. The accident was caused solely by the fault of the pilot in charge of the English vessel. It was urged that as the suit was brought by the owners of a foreign vessel, the English vessel ought to be liable, although the loss was by the fault of the pilot, but Dr. *Lushington* said: "Whoever sues in the courts of any country must take the remedy which the law of that country allows." In *General Steam Nav. Co. v. Guillon*, 11 M. & W. 877, the collision took place on the high seas. The defendant's vessel was French. One question before the court was as to the meaning of the third plea. The defendant's construction of the plea was that by the law of France he was not liable, but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master of the vessel. The plaintiffs contended that the plea meant that in the French courts the mode of proceeding would be to sue the defendant jointly with the other shareholders of the company under the name of their association. The court expressed the opinion that if the defendant's construction of the plea was correct, he had a good defence, and that if the plaintiff's construction was correct the plea was bad, as the form of remedy was to be governed by the *lex fori*.

<sup>2</sup> This is the rule in England whether the suit is by a foreign vessel against an English vessel, or by an English vessel against a foreign vessel. *Williams v. Gutch*, 14 Moore, P. C. 202; *The Dumfries*, Swabey, Adm. 63, 125; *The Zollverein*, id. 96; *The Sylph*, id. 233; *The Saxonia*, in P. C., Lush. Adm. 400. See, however, *The Cleadon*, in P. C., Lush. Adm. 158, where the court state that the English rule would govern the English vessel. In *The Belle*, U. S. D. C., N. Y. 1867, *Shipman, J.*, a collision occurred in 1862, between an English vessel and an American, off the New Jersey shore, between Barnegat and Sandy Hook. The English vessel did not have the lights required by act of parliament. Held that the case was to be decided by the maritime law.

lations shall apply to the ships of such foreign country whether within British jurisdiction or not.<sup>1</sup>

By the later and better authority, it would seem that a collision gives to the suffering ship a lien on the ship causing the damage.<sup>2</sup> But this lien lasts only long enough to give the injured party a reasonable opportunity to enforce it.<sup>3</sup> And there is no lien in

<sup>1</sup> 25 & 26 Vict. c. 63, § 58. For countries to which these rules now apply, see Lush. Adm. App. lxxvii, and following page.

<sup>2</sup> Dr. *Lushington*, in *The Volant*, 1 W. Rob. 383, 387, is reported to have said that the damage does not create a lien. See, however, *The Bold Buccleugh*, 3 W. Rob. 220, 2 Eng. L. & Eq. 536. When this latter case came before the privy council, on appeal, the subject received an elaborate discussion, and it was held that a lien existed. The collision took place December 14, 1848. On the 19th suit was commenced in England, but the ship left the country before she could be arrested. Subsequently, the vessel being in Scotland, a suit was commenced against her there and bail given. In August, 1849, the vessel having returned to England, an action was again brought against her, and she was arrested. The lien was enforced, though the vessel had been sold on the 26th of June previous. Sir *John Jervis*, in delivering the opinion of the court, speaking of the *dictum* of Dr. *Lushington*, above referred to, said: "By reference to a contemporaneous report of the same case, 1 Notes of Cases, 508, it seems doubtful whether the learned judge did use the expression attributed to him by Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a *dictum* merely, not necessary for the decision of the case, cannot be taken as a binding authority." *Harmer v. Bell*, 7 Moore, P. C. 267, 22 Eng. L. & Eq. 62. This decision was affirmed by the privy council in *The Europa*, Brow. & L. Adm. 89. The collision took place off Cape St. Vincent, 13th December, 1859. Suit was brought in February, 1860, but the vessel was not arrested until 14 January, 1863. The vessel was owned in Nova Scotia. In November, 1861, she was advertised for sale in Liverpool, England, and was bought by one of the claimants, and in December of the same year the other claimants became interested in her. She was again in Liverpool 22d June, 1862. There was much evidence on the question whether the plaintiffs had been guilty of laches, and it was held that they had not been, and that the lien was not lost. In this country the current of authorities is in favor of the lien. In the case of *The Creole*, Legal Intelligencer, May 7, 1852, Judge *Kane* said that, though there was, properly speaking, no lien in collision, because the subject was tort, yet the vessel would be liable even in the hands of a purchaser. In the same court it has been held, that collision creates a lien. *Edwards v. The Steamer R. F. Stockton*, Crabbe, 580. See also *The America*, U. S. D. C. Northern District of N. Y., 16 Law Rep. 264. And the existence of the lien has recently been recognized by the Supreme Court of the United States. *The Rock Island R. Bridge*, 6 Wallace, 213.

<sup>3</sup> Where the libel was not filed till more than twenty months after the collision, during which time the vessel had been sold, the colliding vessel was held not to be responsible. *The Admiral*, U. S. D. C. Mass., 18 Law Rep. 91. See also

favor of the injured vessel, on the cargo laden on board of the offending ship, although it belongs to the owner of such ship.<sup>1</sup> There is, however, a lien on the freight.<sup>2</sup> If a vessel is injured by running into a bridge across a navigable stream, an action *in rem* will not lie against the bridge,<sup>3</sup> nor will such an action lie by the owners of the bridge against the vessel.<sup>4</sup>

The captain of a sloop of war is not liable for the damage done by his vessel coming into collision with another vessel, he being properly below at the time, and the deck being under the control of a lieutenant, who had the actual direction and management of the vessel.<sup>5</sup> So when the master of a merchant vessel was on shore at the time of the collision, and the vessel was under the charge of a pilot, it was held that the master was not liable.<sup>6</sup>

The *Europa*, Brow. & L. Adm. 89, cited *ante*. In *The D. M. French*, U. S. D. C. Mass., 1865, *Lowell, J.*, the collision took place in Boston harbor in August, 1858. The libel was filed in September, 1862. The libellant lived in Boston, and the vessel at the time of the accident belonged to New Jersey. The libellants knew where she was owned. On the voyage immediately after the collision she was at Salem in Massachusetts, and afterwards at Fall River and New Bedford, both in Massachusetts. The libellants knew she was in Salem, but it does not appear from the decision whether they knew she was at the other ports mentioned. At the time the libel was filed, the vessel had been sold, and was owned by persons who knew nothing of the collision. The libel was dismissed. One of the *bona fide* purchasers had sold his share during the pendency of the action, to a person who at that time had notice of the claim, and it was contended that the libel might be enforced against this part, but the court held that the purchaser was protected by the title of his seller.

<sup>1</sup> *The Victor*, Lush. Adm. 72.

<sup>2</sup> The cargo may be arrested for the freight due, and the owner of the cargo is entitled to have it released on paying into court the amount due the ship-owner. Any deduction for the gross freight stipulated for in the contract of affreightment will be allowed, and, if the cargo is delivered at a place short of the port of destination, such reasonable sum as may be agreed upon as compensation for this between the shipper and ship-owner will be allowed, as will also the costs of paying the freight into court. *The Leo*, Lush. Adm. 444. In *The Flora*, Law Rep. 1 Adm. 45, it was held that if the cargo is arrested for the freight, and no freight is due the cargo must be delivered up, that at an intermediate port no freight is due, and that the right of the master to earn freight by carrying the cargo on, is not transferred by the collision to the injured party.

<sup>3</sup> *The Rock Island R. Bridge*, 6 Wallace, 213.

<sup>4</sup> *The Bark Savannah*, U. S. D. C. Penn. *Cadwallader, J.*, June, 1868.

<sup>5</sup> *Nicholson v. Mounsey*, 15 East, 384.

<sup>6</sup> *Snell v. Rich*, 1 Johns. 305.

In England in 1854, the Merchants Shipping Act<sup>1</sup> provided that if any damage should arise from the non-observance of the rules established by that act, such damage should be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time. In a case which arose under this statute, it was held that the owners of the vessel were nevertheless liable for a collision caused by the non-observance of the rules.<sup>2</sup>

If a vessel has, by no voluntary action on her part, contributed to the collision, as where she is thrown against another vessel by the swell caused by a passing steamer, she is not liable.<sup>3</sup> We shall consider, hereafter, the question how far the owners are liable when the vessel is in charge of a pilot. It has been decided in England that if a vessel is employed by government, no action can be maintained against the owners for damages caused by a collision which took place in consequence of the positive orders of a commander in the royal navy under whose command she was.<sup>4</sup>

And where proprietors of docks are empowered to direct where a vessel shall be moored in a dock, and a penalty is imposed on all persons refusing to obey the orders of the dock-master, the vessel is not liable for damages caused by a collision, while being moved according to the dock-master's directions.<sup>5</sup>

Although a ship is chartered to a foreign government, and the owners give up all control over her, she is liable *in rem* for a collision caused by the fault of the charterer's agents.<sup>6</sup> If a collision

<sup>1</sup> 17 & 18 Vict. c. 104, § 299.

<sup>2</sup> The Seine, Swabey, Adm. 411.

<sup>3</sup> Kissam v. The Albert, U. S. D. C., N. Y., Boston Courier, April 3, 1858, 21 Law Rep. 41. The vessel injured in this case had been fastened alongside a brig, and rested against the anchor of the latter, which was catted on the star-board bow. The carrying the anchor in this way was prohibited by the harbor regulations of the port. The anchor ripped up the timbers of the vessel, but the court held that it was not the direct cause of the loss. So, where one vessel runs into another and causes it to come into collision with a third vessel, the second is not liable to the third if damage ensue, if it was not otherwise to blame. The Moxey, Abbott, Adm. 73.

<sup>4</sup> Hodgkinson v. Fernie, 2 C. B. N. s. 415, 40 Eng. L. & Eq. 306. It was also held in this case, that they were liable if the injury was caused by negligence on the part of the master in adhering to the orders, if these were given in reference to an existing state of circumstances, and were not intended to apply to an emergency. And see Fletcher v. Braddick, 5 B. & P. 182.

<sup>5</sup> The Broeder Trow, 20 Eng. L. & Eq. 634; The Bilboa, Lush. Adm. 149.

<sup>6</sup> The Ticonderoga, Swabey, Adm. 215.

takes place between a steam-tug and a vessel being towed by the tug, owing to the fault of those in charge of the vessel, the vessel is liable, and the doctrine of master and servant does not apply.<sup>1</sup> And a vessel is liable *in rem* for an injury caused by the neglect of a contractor who had the sole charge of the vessel.<sup>2</sup>

The question has arisen, when a vessel is in tow of a steam-tug, and collision occurs with another vessel, which is responsible, the steam-tug or the vessel in tow? It is obvious that two perfectly distinct views may be taken of the relation between them. According to one, the vessel towing is but the servant of that which is towed; this latter is the master, and is responsible for the acts of the former as its servant. According to the other, the vessel towed is for the time under the absolute control of the vessel towing, and this latter is therefore responsible for any mischief done. We apprehend it to be an error to assume that either of these relations must exist in any particular case. The inquiry should always be, which party is the principal, and which the servant. And wherever the relation of principal and agent exists, the case should be decided on the principles of agency. Generally, we should say that the tug was probably the servant, and the vessel which employed her the principal, and responsible as such. But it will be seen that the cases are in irreconcilable conflict.<sup>3</sup>

<sup>1</sup> The *Julia*, Lush. Adm. 224.

<sup>2</sup> The *Ruby Queen*, Lush. Adm. 266. The vessel in this case had been placed under the control of ship agents, for sale. As to the personal liability of parties employing contractors, for the acts of their servants, see *Philadelphia R. v. Philadelphia Steam Tow Boat Co.* 23 How. 209, 216.

<sup>3</sup> It may be clear that an action will lie against the ship where she is the immediate cause of the damage. The *Carolus*, 2 Curtis, C. C. 69; but is the tug also liable? In a case before the United States District Court for the District of Massachusetts, Judge *Sprague* held that it was. The *R. B. Forbes*, 1 Sprague, 328. The action was *in rem* against the steamer for damages caused by a collision between a schooner owned by the libellant, and the "*Romance of the Seas*," a vessel of about one thousand six hundred tons, towed by the steamer, and firmly lashed to her side. The evidence was conflicting as to the point whether the orders for managing the two vessels were given by the officers of the tug or by those of the ship. But the learned judge held, that it would make no difference, as to third parties, whether the tug was under the control of the officers or the pilot of the ship. The fact was also relied on that the action was *in rem*, and "the offending thing" was liable. It was also said, that it was not necessary to be decided whether the ship might not also be responsible. It is clear, however, that unless the ship was regarded as under the control and direc-

A vessel negligently running into a barge in tow of a steamer,

tion of the tug, the latter could not have been held liable, for in this case the ship was "the offending thing," the direct cause of the collision. This case was affirmed on appeal. 1 Clifford, C. C. 331, the court finding on the facts that the vessel was under the control of the tug. A similar decision was rendered in *The Steamboat Rescue*, 2 Sprague, 16. In *Sproul v. Hemmingway*, 14 Pick. 1, the action was brought by the owner of a vessel run into by the vessel of the defendant. It appeared that the colliding vessel was being towed astern of a steamer down the Mississippi, and the collision was caused by the negligence of the master and crew of the steamer. It was held that the defendant was not liable. Speaking of the case of a vessel towed by the side of a steam-tug, the court said: "The payment for the privilege of being thus moved or transported, is precisely like freight paid for heavy luggage, timber, or spars, for instance, carried in or upon a ship. The whole conduct and management is entirely under the control of the master and crew of the towing vessel in the one case, as it is of the freighting ship of the other. If collision takes place between the side ship, thus firmly lashed, and another vessel, it is as directly attributable to the steamboat, and her officers and crew, as if the steamboat herself had come into collision with the other vessel. The towed ship is the passive instrument and means, by which the damage is done. But there is no difference, in this respect, between the condition of one of the side ships and a ship towed astern, except this; that on board the ship towed astern by means of a cable, something may and ought to be done by the master and crew, in steering, keeping watch, observing and obeying orders and signs; and if there be any want of care and skill in the performance of these duties, and damage ensue, then the case we have been considering does not exist; the damage is attributable to the master and crew of the towed ship, and they and their owners must sustain it." These cases are in direct variance with two decisions in the Circuit Court of the United States for the Eastern District of Pennsylvania. *Smith v. The Creole*, 2 Wallace, C. C. 485; and *The Steam-Tug Sampson*, 3 Am. Law Register, 337. In both these cases the actions were *in rem* against the tugs, but the court held that tugs were but servants of large vessels, and therefore were not responsible to third parties.

In *Cushing v. Ship John Fraser*, 21 How. 184, an action was brought against a tug, and the vessel in tow, which was the direct cause of the collision. The court held that the tug and not the vessel in tow was liable. *Taney*, C. J., said: "So far as the ship is concerned, we see nothing in the evidence from which any fault or mismanagement can justly be imputed to her. According to the usage of trade at that port, she engaged a steamboat, well acquainted with the harbor and its usages, to bring her in. When fastened to the hawser and in tow, she was controlled entirely by the steam-tug, both as to her course and speed. The steamboat was not subject to the orders of the commander of the ship, but was altogether under the control of her own commander for the time." On page 194 the court also said: "It is true that the *John Fraser* was the *res* or thing which struck the *James Gray*, and did the damage. But the mere fact that one vessel strikes and damages another, does not of itself make her liable for the injury;

is liable to the owners of the barge.<sup>1</sup> And if a steamer having a barge in tow is navigated so unskilfully that the barge is in danger of sinking a sloop, and the sloop to prevent the

the collision must in some degree be occasioned by her fault." This case was affirmed in *Sturgis v. Boyer*, 24 How. 110, which was a suit *in rem* against a vessel and the tug which was towing her. The evidence showed that the vessel did not have any master or crew on board except the mate, and that he exercised no control of the movements of the vessel. The tug was lashed firmly to the side of the vessel, and the master of the tug had the entire control. The injury was caused by the flying jib-boom of the vessel striking the peak halyards of a lighter and capsizing her. Held that the tug, and not the ship, was liable. See the remarks of the court on pages 121 and 122, for instances where both the tug and tow are liable, and where the tow can alone be held. See *s. c. nom. The Hector*, 4 Blatchf. C. C. 199; *Snow v. Hill*, 20 How. 543.

In England, the tug seems to be considered as a mere servant of the vessel towed. In *The Duke of Sussex*, 1 W. Rob. 270, the action was *in rem* against the tug. It was set up in defence that at the time of the collision she was towing a vessel, and under the direction of a pilot on board such vessel. Dr. *Lushington* held, that if the orders of the pilot were obeyed, the owners of the vessel towed would not be responsible; but if not, they would be. And in *The Gipsy King*, 2 W. Rob. 537, where the action was brought against the vessel towed, he said: "Now I have, upon former occasions, already expressed my opinion, that a vessel in charge of a licensed pilot, whilst in tow of a steam-tug, is, under ordinary circumstances, to be considered as navigated by the pilot in charge. That if the course pursued by the steam-tug is in conformity with his directions, and a collision takes place, the pilot is responsible, and not the owners of the vessel, or of the steam-tug. If, on the contrary, the steamer disregarded the directions of the pilot, and the collision was occasioned by her misconduct, the owner of the ship would in this case be responsible, in this court, as for the acts of their servant; and they must seek their redress against the owners of the steam-tug in some other form of action." See also *The Christina*, 3 W. Rob. 27, affirmed *Petley v. Catto*, 6 Moore, P. C. 371; *The Ticonderoga*, Swabey, Adm. 215; *The Unity*, id. 102; *The Cleadon*, Lush. Adm. 158; *The Kingston-By-Sea*, 3 W. Rob. 152. In this case Dr. *Lushington* said, addressing the Trinity Masters: "It is well known, that, according to your rules, a steamer is always to be considered as having the wind free; and by the decisions in this court, a steamer towing another vessel is to be considered as in the service of the owners of the vessel she has in tow, and the owners of the vessel in tow are responsible for the acts of the steamer."

It seems to be well settled that canal boats and barges in tow are considered as being under the control of the tug, and the latter, therefore, is liable. *The John Counter*, Vice Adm. Ct. Lower Canada, 18 Law Rep. 553; *The Express*, 1 Blatchf. C. C. 365, overruling the same case in the District Court, *Olcott*, Adm. 258. See also *Steamboat New York v. Rea*, 18 How. 223.

<sup>1</sup> *The Propeller Commerce*, 1 Black, 574.

collision puts out a fender, by which the barge is injured, the owner of the barge can recover for the damage done from the steamer.<sup>1</sup>

In admiralty, the evidence of all persons on board is admitted *ex necessitate rei*, unless the person is interested as part owner.<sup>2</sup> And the admissions of the master are competent evidence against his owners; but admissions of the mate and crew are not, unless made at the time of the collision, so as to form part of the *res gestæ*.<sup>3</sup>

The practice of taking the evidence of the seamen of the opposing vessel is condemned by Dr. Lushington.<sup>4</sup> But little reliance seems

<sup>1</sup> The Steamer New Philadelphia, 1 Black, 62.

<sup>2</sup> The Catharine of Dover, 2 Hagg. Adm. 145. A party to a suit may now testify. Act of 1864, ch. 210, § 3, 13 U. S. Stats. at Large, 351; Act of 1865, ch. 113, 13 U. S. Stats. at Large, 533.

<sup>3</sup> The Midlothian, 5 Eng. L. & Eq. 556. See also The Enterprise, 2 Curtis, C. C. 317, 320. But such declarations or admissions will have but little weight in opposition to their deliberate testimony as to the facts. The Steamboat New Jersey, Olcott, Adm. 415; The Empire State, 1 Bened. Adm. 57. In The Foyle, Lush. Adm. 10, it was alleged that shortly after the collision certain of the crew of the libellants' vessel admitted that the collision was owing to the fault of their vessel. The seamen were parties to the action, suing for their private effects, and this was urged in favor of admitting the article. Dr. Lushington said: "I cannot think that a sufficient reason for admitting this article. If we allow admissions by the crew to be evidence in cases of collision, we shall have conversations in pot-houses pleaded, counter-pleaded, proved and disproved, and the expenses of parties doubled; and all to no purpose. We have never allowed such admissions here, and I do not intend to allow them. The article must be struck out." In The Great Eastern, Holt, 169, a paper signed by the master of a vessel which had been run down by the steamer Great Eastern, was offered in evidence by the defence. This paper was signed by the master while on board the Great Eastern two days after the accident, and exonerated the steamer from blame. Dr. Lushington said: "I am of opinion that the obtaining from persons who have been on board a ship which has been run down and destroyed, when on board the other ship which was concerned in the calamity, whether guilty or not, there is nothing more to be deprecated than obtaining from them, in prejudice of further investigation, a document written by others and signed by themselves. We are perfectly well aware that so many circumstances may occur which may induce a man, either from good temper or good nature, and, in some cases, from intimidation, — for they are not without example, — to sign a document of this kind, that I hold the practice to be strongly reprobated."

<sup>4</sup> The Commerce, 3 W. Rob. 295. In The Monticello, U. S. D. C. Mass. 1867, Lowell, J., three witnesses from the claimants' vessel were examined in behalf of the libellants. The language of Dr. Lushington was cited and the learned judge said: "Anything like tampering with witnesses would deserve and would receive



to be placed in witnesses' estimates of times and distances at the time of a collision.<sup>1</sup>

In England the log of a light-ship is admitted in evidence as to the correctness of the statements contained therein.<sup>2</sup> So, the books containing the entries made by the coast guard and sent to the coast guard office, are admissible in evidence to prove the state of the wind and weather at the time of the collision, without calling the person who made the entries.<sup>3</sup> Testimony of men on board their own vessel, respecting their own acts, receives greater credit than the testimony of men on the other vessel.<sup>4</sup>

In measuring the damages in a case of collision, all the direct and immediate consequences are to be taken into consideration; as loss of freight, detention, expense, and the like.<sup>5</sup> The rule being the sternest reprobation of the court, but the case shows nothing of that sort; and it is to be remembered that we are not presented with *ex parte* affidavits, as in the case cited, but with full examination and cross examination which develop the history of their engagement as witnesses, and show nothing improper."

<sup>1</sup> The Vanderbilt, Abbott, Adm. 366; The Emily, Olcott, Adm. 135; The Argus, id. 304; The Gustav, Holt, 30; The Great Eastern, Holt, 176, Brow. & L. Adm. 287; The Warrenton, U. S. D. C. Mass. Lowell, J.; The Monticello, same court, 1867; The Hattie Ross, U. S. D. C. Conn. 1866, Shipman, J.

<sup>2</sup> The Maria Das Dores, Brow. & L. Adm. 27. The log was admitted to show the direction of the wind. Dr. Lushington said: "Let it be known that this court does not in these cases require the testimony of the light-ship keeper, the person who actually made the entries in the log. These logs are official books, kept under authority, and deposited under official custody. I know that in strictness they are not admissible in evidence *per se*; but this court, for reasons of public convenience, allows of several relaxations in the rules of evidence observed in the courts of common law." A note to this case is as follows: "In a subsequent case the court said that in consequence of a representation from the Trinity House of the inconvenience that would be occasioned, if their officer was continually subpoenaed to attend with the light-ship logs, he should for the future allow such logs to be proved by examined copy. Such accordingly has been the practice since." See also The John & Eliza, Holt, 92.

<sup>3</sup> The Catherina Maria, Law Rep. 1 Adm. 53.

<sup>4</sup> The Empire State, 1 Bened. Adm. 57. See also Pope v. Steamboat R. B. Forbes, 1 Clifford, C. C. 338.

<sup>5</sup> In The Countess of Durham, 9 Month. Law Mag. (Notes of cases) 279, the law is stated with great precision by Dr. Lushington. He says: "No doubt, by the law of this court, when it is clearly proved that one vessel is the wrongdoer, the owners of that vessel are, to the extent of its value, responsible for all the damage which occurred through the default or neglect of her master or crew, and not only the immediate damage, but they would be responsible also for what we call *consequential* damage, that is, all damage which may subsequently take place

*restitutio in integrum*.<sup>1</sup> Whether damages are to be allowed for the detention of the injured vessel while undergoing repairs, may not

that could be fairly attributed exclusively to the act of the original wrongdoer; and this principle of law is based, like all others, upon reason and common sense." And where a vessel was run into, and rendered unmanageable, in consequence of which she afterwards, but during the same night, got upon a sand bar, it was held, that the other vessel, being in fault in causing the collision, was liable for the subsequent damage. *The Mellona*, 3 W. Rob. 7. See also *The Steamboat Narragansett*, Olcott, Adm. 246. In such a case it has been held that the burden of proof is on the vessel causing the original damage, to show that the subsequent injury was caused by the want of ordinary nautical skill and prudence on the part of the master of the damaged ship. *The Pensher*, Swabey, Adm. 211. In this case Dr. *Lushington* said: "It has been contended sometimes that a vessel run into and abandoned by her crew has been improperly abandoned. The court has always said, that if it could be proved that the abandonment took place when the parties might have known to a certainty that their lives were not in danger, then the court would take that into consideration." In *The Flying Fish*, Brow. & L. Adm. 436, in the Privy Council reversing the decision of Dr. *Lushington*, it was held that the defendant in a cause of collision is not liable for such damages as might have been avoided by the exercise of ordinary skill and diligence after the collision, on the part of those in charge of the injured ship. In this case the collision took place in the British Channel at night. The vessel was afterwards properly run ashore, but was left there, the master refusing all offers of assistance. Lord *Chelmsford* said: "It is to be observed that this was not the case of a sudden emergency, leaving no time for deliberation, when great allowances should be made for any error in judgment which may occur. In this case there was no danger to life, nor any immediate apprehension of the loss of the vessel, and the captain had some hours to decide what course was best to be adopted." See also *The Rebecca*, Blatchf. & H. Adm. 354; *The Linda*, Swabey, Adm. 306; *The Kingston-By-Sea*, 3 W. Rob. 157; *Philadelphia R. v. Philadelphia Steam Towboat Co.* 23 How. 209; *The Lotus*, Holt, 183; *The Lena*, Holt, 213.

<sup>1</sup> *The Black Prince*, Lush. Adm. 573; *The Clyde*, Swabey, Adm. 23; *The Pactolus*, id. 173; *The Inflexible*, id. 200; *The Granite State*, 3 Wallace, 310. In the case of *The Gazelle*, 2 W. Rob. 279, 284, Dr. *Lushington* says the party is to be put in the same situation, as nearly as possible, as he would have been in if no collision had taken place. Where a boat was several times maliciously run into, Judge *Hopkinson* held that damages should be given for the loss consequent on the passengers being prevented from going in the boat by reason of the collisions. *Ralston v. The State Rights*, Crabbe, 22. And in *Steamboat Co. v. Whilldin*, 4 Harring. Del. 228, 233, it was held that if the boat was purposely run into, vindictive damages might be given. But if not purposely, compensatory only, to enable the owners to put her in as good order as before, but no allowance was to be made for supposed profits. See also *The Steamboat Narragansett*, Olcott, Adm. 246; *The Bark Lotty*, id. 329, 334; *Myers v. Perry*, 1 La. Ann. 372; and *Cummins v. Spruance*, 4 Harring. Del. 315, where the same rule was adopted, and it was also held, that if the vessel

be certain ; but the later, and we think<sup>1</sup> the better rule, allows them.<sup>1</sup>

received injuries which could not be repaired, damages were to be allowed for her impaired value. See also *Atchison v. Steamboat Dr. Franklin*, 14 Mo. 63 ; *The Pilot Boat Blossom*, Olcott, Adm. 194.

<sup>1</sup> In some of the cases above cited and in *Smith v. Condry*, 1 How. 28, they were not allowed. But the last case has been virtually overruled by a more recent case in the same court, and we consider the well-settled rule of law now to be, that where a vessel is run into while performing a particular voyage, or while engaged in the usual course of her employment, the profits which she would have made but for the accident are to be allowed. Thus, in *The Gazelle*, *ut sup.*, the gross freight for the voyage was allowed, deducting from it the expenses incident to its receipt, such as wages, pilotage, lighterage, tonnage, etc. See also *The Canada*, Lush. Adm. 586 ; *Yates v. Whyte*, 4 Bing. N. C. 272, 5 Scott, 640 ; *Jones v. Whyte*, 2 Jur. 308 ; *The Eolides*, 3 Hagg. Adm. 367 ; *Tindall v. Bell*, 11 M. & W. 228. And where a vessel was engaged in a salvage service, and was run into, and thereby prevented from completing it, it was held that the sum which she would otherwise have earned, might be recovered. *The Betsey Caines*, 2 Hagg. Adm. 28. In *The Yorkshireman*, 2 Hagg. Adm. 30, note, a fishing smack was on a voyage from London to Norway, to receive a cargo of lobsters. Having been run into, another vessel was employed to finish the voyage, and it was held that the amount of freight which was paid to this vessel should be allowed as damages. In a somewhat similar case *Dr. Lushington* held, that if it could be satisfactorily proved that the owners of the vessel used every possible exertion to pursue the voyage and could not, damages would be allowed. *The Aline*, 5 Month Law Mag. 302. This question came before the Supreme Court of the United States in a case brought up by writ of error from the circuit court of the United States for the district of Ohio. The case was argued at great length by counsel, and the principles on which the right to recover for loss of profits rest, clearly elucidated by the court. The judge in the court below instructed the jury that if they found for the plaintiff, they should give him damages which would remunerate him for the expenses incurred in raising the boat and repairing her, *and also for the use of her during the time lost by reason of the collision*. *Barrett v. Williamson*, 4 McLean, C. C. 589. This ruling was affirmed by the supreme court. Mr. Justice Nelson said : " But if it can be shown, that the vessel might have been chartered during the period of the repairs, it is impossible to deny that the owner has not lost in consequence of the damage the amount which she might have thus earned. The market price, therefore, of the hire of the vessel, applied as a test of the value of the service, will be, if not as certain as in the case where she is under a charter-party, at least so certain that for all practical purposes in the administration of justice no substantial distinction can be made. It can be ascertained as readily, and with as much precision, as the price of any given commodity in the market, and affords as clear a rule for estimating the damage sustained on account of the loss of her service, as exists in the case of damage to any other description of personal property of which the party has been deprived." *Williamson v. Barrett*, 13 How. 101, 111. See also *Sturgis v. Clough*, 1 Wallace, 269 ; *The Infexible*,

The owners of a vessel which is wrongfully injured by a collision may recover for the injury done to the cargo on board which they are carrying for hire,<sup>1</sup> even though the vessel be not strictly a common carrier.<sup>2</sup>

Swabey, Adm. 200; *The Steamboat Rhode Island*, 2 Blatchf. C. C. 113; *Olcott*, Adm. 505, *Abbott*, Adm. 100; *Halderman v. Beckwith*, 4 McLean, C. C. 286. But see *The Clarence*, 3 W. Rob. 283, where evidence was offered that the boats of the company to which the *Clarence* belonged, usually earned at least £20 a day, and a demurrage of £260, founded upon this estimate, was claimed as damages. Dr. *Lushington* held, that the evidence was not sufficient; that it did not follow as a matter of course that anything was due for the detention of a vessel while being repaired; but that it must be proved that the vessel would have earned freight, and that such freight was lost by the collision. See also *The Hebe*, 2 W. Rob. 530; *The South Sea*, Swabey, Adm. 141. And when a vessel is sunk, and full damages are allowed as for a total loss, the plaintiff cannot recover anything in the nature of a demurrage for loss of the employment of his vessel or his own earnings. *The Columbus*, 3 W. Rob. 158; *The Empress Eugénie*, Lush. Adm. 138. And the language of the court in this case would show that in case of a total loss nothing beyond the value of the vessel can be recovered by way of increasing the damages. See *The Inflexible*, Swabey, Adm. 200. In *The Black Prince*, Lush. Adm. 568, the plaintiff's vessel was one of a line of steamers belonging to different owners, which took turns in sailing at fixed intervals, and each vessel was in the ordinary course of business idle a certain time in port. In consequence of a collision the plaintiff's vessel lost her turn, which was taken by another steamer on the same line, and the plaintiff's vessel took the next turn. It was held that the measure of damages was not the length of time the plaintiff's vessel was undergoing repairs, nor the difference between the usual time of her being in port and the actual time she was in port, but the number of days she was detained beyond the date on which, but for the collision, she would have sailed in her regular turn. In *The Hermann*, 4 Blatchf. C. C. 441, it was held that the charge for lay days in a charter party furnishes no test to determine the damages for detention during the repair of a vessel, in a case of collision. In *The Stromness*, U. S. D. C. Mass., *Lowell, J.*, the rule is stated as follows: "The rule concerning demurrage in collision cases is that the fair market value of the vessel may be charged for the time she is necessarily detained for repairs, if she has lost any employment thereby, and in the absence of evidence it is a fair presumption that a costly vessel would have been employed at this season. It would be well, perhaps, to have a fixed rate per ton per day for this class of vessels, such as has been adopted by the Registrar and Merchants in the English Admiralty. In the absence of any such usage, I must rely on the evidence, which seems to show the charge of \$40 per day to be fair. In this case the repairs took six days, and were of such a nature that they might have been made while the vessel was discharging. It took her three days to discharge, and the court allowed three days demurrage."

<sup>1</sup> *The Propeller Commerce*, 1 Black, 574.

<sup>2</sup> *The Commander In Chief*, 1 Wallace, 43. In the case of *The Propeller Com-*

If the vessel is totally lost, the rule of damages is the market value of the vessel just before the collision.<sup>1</sup> If a vessel is injured by a collision in a foreign port, and is there sold by the master under circumstances which render the sale valid, it seems that the owner is entitled to recover the value of the vessel just prior to the collision, less the proceeds of the sale.<sup>2</sup> If a vessel injured by a collision is assisted by salvors, and is afterwards arrested by them, the owners are not obliged to make a tender of the amount due, and may recover their costs of defending the salvage suit from the vessel that ran into them.<sup>3</sup> Where a ship was sunk by a collision and afterwards raised and repaired, and the cost of repairs exceeded the original value of the vessel, and this might have been ascertained before the repairs were commenced, it was held that the plaintiff could not recover as for a partial loss, but that the measure of damages was the value of the ship before the collision, with interest from the date when the cargo would in ordinary course have been delivered, together with the costs of raising and the cost of placing the ship in the dock for inspection, less the value of the wreck as raised.<sup>4</sup>

When a vessel is sunk by a collision, and subsequently raised by the owner of the colliding vessel and towed into port, the question has arisen whether the former owner is bound to take her, or whether he may recover damages as for a total loss. It has been held that the former owner is not obliged to take her back, after being raised, in an unrepaired state, but the point is still an open one whether she may be repaired and tendered back<sup>5</sup>.

merce, the court speak of the rule allowing the carrier to recover the value of the cargo, as a settled one; but in *The Commander In Chief*, where no objection had been taken to the non-joinder of the owners of the cargo in the court below, the case was decided in favor of the libellants on this ground, and the court refrained from deciding it on the broad ground that the carrier may in all cases recover the value of the cargo.

<sup>1</sup> *The Clyde*, Swabey, Adm. 23.

<sup>2</sup> See *The South Sea*, Swabey, Adm. 141.

<sup>3</sup> *The Legatus*, Swabey, Adm. 168. But see *Tindall v. Bell*, 11 M. & W. 228.

<sup>4</sup> *The Empress Eugénie*, Lush. Adm. 138. This was the decision of the Registrar. It seems, however, to have received the sanction of Dr. *Lushington*.

<sup>5</sup> In *The Columbus*, 3 W. Rob. 158, the vessel was raised but not repaired, and notice given to the agent of the owner of the fact, with an intimation that the owner of the *Columbus* was ready to deliver up the same, and that he would not be responsible for any further damage or expense that might be incurred by her

It is no defence to a suit for damages caused by a collision, that no loss would have been sustained if the injured vessel had been stronger.<sup>1</sup>

Where the bills for repairs were exaggerated with the knowledge of the master of the vessel, and the District Court reduced the amount to the lowest estimate, the decree was affirmed by the Circuit Court; and it was said that if it had appeared that this fraud had been committed with the knowledge of the owner of the vessel, nothing should have been allowed, and that as a general rule owners must be held responsible for such acts of the master.<sup>2</sup>

The rule in insurance of one third off, new for old, does not apply to a claim for damages from collision, excepting in an action on the policy.<sup>3</sup>

But the owners are entitled to the full expenses of repairing the vessel and fitting her for sea, although the repairs may make her more valuable than she was before the collision.<sup>4</sup> Where a vessel injured by a collision was towed into port, it was held that the other vessel was liable for the entire charge for towing, although it was highly probable that the vessel injured would have had to be towed part of the way if no collision had taken place.<sup>5</sup>

If a cargo of goods is injured by a collision, it seems that remaining unrepaired. Dr. *Lushington* said, that the principle of abandonment as applied to insurance cases, did not apply to cases of collision; that if a vessel is run into and partially damaged, the owner is bound to bring her into port if possible, but if she is sunk, it is not incumbent on the owner to go to any expense whatever for the purpose of raising her, and that if, when she was raised, he was obliged to receive her back, he was not bound to repair her, but might leave her lying in port. Under all the circumstances of the case, it was held that the libellant was entitled to recover the whole value of his vessel, and that the respondent was entitled to have the vessel. The court said the proper course for the parties to have pursued would have been "to have applied to the court, stating the circumstances in which the vessel was, and to have called upon the court to decree a sale of the vessel, and that the proceeds might be brought in to abide the result of the suit." Whether the owner of the colliding vessel could have repaired her and tendered her back, after she was raised, was not decided.

<sup>1</sup> *Inman v. Funk*, 7 B. Mon. 538. See also *The Granite State*, 8 Wallace, 310.

<sup>2</sup> *The Sampson*, 4 Blatchf. C. C. 28.

<sup>3</sup> *The Gazelle*, 2 W. Rob. 279, s. c. 8 Jur. 429; *The Pactolus*, Swabey, Adm. 174; *The Nautilus*, Ware, 2d ed. 529, 534. See also *Williamson v. Barrett*, 13 How. 101, 110, per *Nelson, J.*; *The Hebe*, 2 W. Rob. 530, 536.

<sup>4</sup> *The Pactolus*, Swabey, Adm. 173.

<sup>5</sup> *The Inflexible*, Swabey, Adm. 200.

pensation is to be made for its value at the port of shipment, and not for its value at the port of destination.<sup>1</sup>

As to the costs in a case of collision, the general rule is the same in admiralty as at common law; but in the exercise of its equitable power, admiralty may hold the prevailing party to pay costs.<sup>2</sup>

<sup>1</sup> *Smith v. Condry*, 17 Pet. 20, 1 How. 28. In *Sedgwick on Damages*, 4th ed. 469, *Adams v. The Ocean Queen*, U. S. D. C. New York, *Shipman*, J., Nov. 1866; *Gordon v. The Propeller Vaughan*, *Blatchford*, J., Jan. 1868, are also cited to this point.

<sup>2</sup> The general rule is thus stated by *Dr. Lushington* in *The Christina*, 8 Jur. 321: "The party, who fails in any suit, except under very peculiar circumstances, should pay the whole of the costs, not as a punishment on that party, but upon the principle of indemnification to the party sued, who has been put to the expense of a suit commenced without sufficient ground, in fact, or in law, to warrant its institution." It was laid down in *The Shannon & The Placidia*, 7 Jur. 380, 1 W. Rob. 463, and in *The Columbus*, *Abbott*, Adm. 384, that, where neither was to blame, each should bear his own costs. But in a similar case, as the court considered the action was brought without cause, the party bringing it had to pay costs. *The Thornley*, 7 Jur. 659. In *Hay v. Le Neve*, 2 Shaw's Scotch Appeal Cases, 395, both vessels were in fault, one a little more than the other; held, that each should pay his own costs. See also *The DeCock*, 5 Month. Law Mag. 303, 2 Law Rep. 311; *The Monarch*, 1 W. Rob. 21; *Foster v. The Sch. Miranda*, 1 Newb. Adm. 227, 6 McLean, C. C. 221. In *The Montreal*, 24 Eng. L. & Eq. 580, it was held, that each should pay its own costs, although one vessel was not liable for any part of the damage, being at the time under the control of a pilot. In *Lenox v. Winisimmet Co.* 1 Sprague, 160, the costs were equally divided. But in *The Brig Rival*, 1 Sprague, 128, the vessel most in fault bore all the costs. The general rule, as has been stated, is that when a libel is dismissed the respondent shall be entitled to costs. See *The Catherine of Dover*, 2 Hagg. Adm. 145, 154. But in *The Scioto*, *Daveis*, 359, though the libel was dismissed, costs were not allowed the respondent as the court considered, under all the circumstances of the case, that the libellant was not to blame in bringing the action. See also *The George*, 2 W. Rob. 286, 9 Jurist, 670, 4 Notes of Cases, 161. If the damage done is slight, and the party has an adequate remedy therefor in a common-law court, costs will not be allowed. *The Steamboat Boston*, *Olcott*, Adm. 407. When a case has been decided and sent to a referee to determine the amount of the damage, the general rule undoubtedly is, that the losing party shall pay the costs of the reference. But to this rule there are exceptions. Thus, in the case of *The Nimrod*, 24 Eng. L. & Eq. 589, the claim was £3,121. The report allowed £1,736. A tender was made before the reference of £1,685. The four principal items disallowed amounted to £1,109. The claimants were condemned in the costs of the reference as to these items, and in the costs of the motion. In *The Cynthia Ann*, 24 Eng. L. & Eq. 579, the sum demanded was £275, the amount allowed was only £91. The Court held, that the sum demanded was so much larger than that granted by the reference

And when the damage occurs by inevitable accident, no costs are given.<sup>1</sup> The court, however, still holds and exercises a discretionary power, and if the libellant had no sufficient reason for bringing the action, condemns him to pay costs, although the loss is by inevitable accident.<sup>2</sup> In one case, where two vessels came into collision, and the crew of the vessel not in fault boarded the other vessel, exhibited their knives, and conducted themselves with great violence, no costs were given.<sup>3</sup>

If the owners of one vessel sue the owners of another at common law, for damages caused by a collision, this will not prevent the owners of the vessel sued from proceeding against the other vessel in admiralty.<sup>4</sup> And although the general rule is that a plaintiff cannot recover judgment in an action at common law and also in a suit in admiralty; yet if he obtains a judgment at common law and the defendants become insolvent, he may proceed against the ship in admiralty although she has been transferred to a third party.<sup>5</sup> A defendant relying on the judgment of a tribunal summoned by a foreign consular court, as a bar to the plaintiff proceed-

that the claimant should pay the costs of the reference and of the motion, as the other party was thereby prevented from making a tender. In *The Celt*, 3 Hagg. Adm. 321, it was held, that though a vessel was not in fault in causing the collision, yet if she did not render assistance after it, she would be liable for the costs. Dr. *Lushington*, in the case of *The Duke of Sussex*, 1 W. Rob. 270, observed, that where the government was a party, although there had been much wavering upon the subject, he apprehended the true principle to be that the crown neither gave nor took costs. But in *The Swallow*, 1 Swabey, Adm. 96, a government vessel in fault was held liable for the costs. The suit here, however, was really against the commander of the vessel. The 18 & 19 Vict. c. 90, has been construed to allow costs against the crown only when the Attorney General or the Lord Advocate is party to the suit. *The Leda*, Brow. & L. Adm. 19.

<sup>1</sup> *The Itinerant*, 8 Jur. 132, 2 W. Rob. 236, 244; *The Ebenezer*, 2 W. Rob. 206, 213; *The Margaret*, Vice Adm. Ct. Quebec, 1 Law Times, N. S. 340.

<sup>2</sup> *The London*, Brow. & L. Adm. 82. In this case Dr. *Lushington* said: "I must say that, considering the collision took place in a most tempestuous night, a night in which, in this one place, eight vessels were wrecked, the plaintiff had good reason to think the collision was a mere accident, which could not have been avoided, and that he was unduly rash in bringing his action. I therefore condemn him in the costs."

<sup>3</sup> *The Catalina*, 2 Spinks, Adm. 23. Dr. *Lushington* said: "I pronounce for the damage, but I cannot encourage parties taking justice into their own hands."

<sup>4</sup> *The Ann & Mary*, 2 W. Rob. 189, 190. See also *Souter v. Baymore*, 7 Barr. 415, s. c. *Knox v. The Ninetta*, Crabbe, 534.

<sup>5</sup> *The John & Mary*, Swabey, Adm. 471.



ing in admiralty in a cause of collision, must prove that the tribunal had jurisdiction by treaty, usage, or voluntary submission.<sup>1</sup>

When a collision occurs on a river which serves as the boundary of two States, in order to determine in which State it took place, the middle of the river is considered as the boundary line.<sup>2</sup>

Some question has arisen as to the liability of the owner of a vessel which having been sunk in a navigable stream, has been run against by another vessel. It was decided as early as 1798, that where a vessel was sunk in the river Thames, without any fault or negligence on the part of the owner of the vessel, an indictment would not lie against the owner for neglecting to remove it.<sup>3</sup> If the owner reclaims possession of the wreck it would seem to be his duty to use all reasonable means to prevent vessels from running against it; but it is equally clear that he may exonerate himself from all liability by selling the wreck, in which case the vendee would assume all his rights and obligations, or by abandoning the wreck.<sup>4</sup> In the previous cases the obstructions were caused

<sup>1</sup> *The Griefswald*, Swabey, Adm. 430.

<sup>2</sup> *Myers v. Perry*, 1 La. Ann. 372.

<sup>3</sup> *The King v. Watts*, 2 Esp. 675.

<sup>4</sup> In *Harmond v. Pearson*, 1 Camp. 515, an action of case was brought against the defendant for neglecting to place a buoy over his lighter which had been sunk in the Thames. The defendant had placed a watchman near the spot to warn vessels, but put no buoy over the lighter until after the plaintiff's vessel was injured. The watchman told the vessel to keep off. It is apparent from the facts stated that the defendant was in possession of the wreck, and the only question was as to the sufficiency of the notice. Lord *Ellenborough* said: "It is a peremptory law of navigation, that when any substance is sunk in a navigable river so as to create danger, a buoy shall be placed over it for the safety of the public. This is the proper and specific notice, which all understand and are bound to attend to. A verbal communication may easily be misunderstood, and is very likely (as in the present case) to lead to confusion and mischief." In *Brown v. Mallett*, 5 C. B. 599, the declaration stated in substance that a barge of the defendant, of which the defendant was then in possession, foundered, sunk, and went to the bottom in a certain navigable river, that the defendant had notice of the same and neglected to cause a buoy or other proper mark to be placed there, and that while the barge was there the plaintiff's vessel was injured by running against it. The declaration was held to be bad on the ground that it did not set forth that the defendant had the possession and control of the barge at the time the damage was inflicted. In *White v. Crisp*, 10 Exch. 312, 26 Eng. L. & Eq. 532, the declaration set forth the foundering of a ship, belonging to one Cooke, in a navigable part of the Bristol Channel called the Cardiff Sands; that after the ship had foundered, Cooke sold the ship to the defendants, and the defendants took possession and continued in possession at the time of the damage done, without taking

without any fault or negligence on the part of the owners of the vessels. If, however, a person wrongfully obstructs a navigable stream, he is liable for the consequences.<sup>1</sup> Where a canal boat in tow of a steam-tug was sunk by a steam propeller running into it, without any fault on the part of the tug, it was held that it was not the duty of the tug to place a light over the wreck, and that the tug was therefore not liable to a vessel which ran upon the wreck.<sup>2</sup>

A question has arisen in regard to the right of a vessel to obstruct a navigable stream by means of a warp; and it has been held that a vessel has the right to use one, and to extend it across the entire channel, but on the approach of another vessel, it is the duty of the vessel using the warp to take notice of the approach of the other, and to lower the warp so as to give ample space in the ordinary travelled part of the channel for her to pass, and to give timely notice of the space so left, but she is not bound to slacken so as to leave the entire channel free, and the approaching vessel should take her course in the place pointed out, but she may go elsewhere under a *bonâ fide* belief that the water is deep enough, and if entangled in the warp may cut it, but the burden is on her to show in such a case that the proceeding was *bonâ fide*.<sup>3</sup>

proper care to prevent damage, and without placing any buoy to give notice where the vessel lay. Injury to the plaintiff's vessel was also averred. There was a demurrer to the declaration and several pleas. The third plea stated that the wreck was lying in a part of a navigable channel which was not ordinarily passed over by vessels except during stress of weather. The fourth plea set forth that the defendants had used all reasonable means for removing the wreck, but were unable before the time, when, &c. to do so, and that by reason thereof, before and at the time, when, &c. they had wholly abandoned and ceased to have any possession of it. The declaration was held good, the third plea bad, and the fourth plea good. See also *Hancock v. York* R. 10 C. B. 348.

<sup>1</sup> *Philadelphia R. v. Philadelphia Steam Towboat Co.* 23 How. 209. In this case a railroad company was authorized by law to build a bridge across the Susquehanna. The company entered into an agreement with certain contractors to build the bridge. These persons drove piles into the channel of the river under the direction of the company's engineer. Before the completion of the contract the company abandoned their purpose of building the bridge, and discharged the contractors. During the progress of the work the contractors had driven certain piles, called *sight-piles*, into the channel of the river, which were not removed or cut off level with the bottom, but were cut a few feet under the surface of the water. The libellant's vessel came into collision with one of these piles, and the company was held liable.

<sup>2</sup> *The Swan*, 3 Blatchf. C. C. 285.

<sup>3</sup> *Potter v. Pettis*, 2 R. I. 483.

A river being a public thoroughfare must as a rule be kept open and free from danger for all ships navigating thereon. When a ship, therefore, is about to be launched, those in charge of the launch are bound to give customary notice, and if there is no custom then reasonable notice.<sup>1</sup>

The right to recover for a loss by collision does not cease by an abandonment to the underwriters.<sup>2</sup>

## SECTION II.

### RULES OF NAVIGATION.

The rules of navigation may be conveniently divided into three classes. 1st. Those relating to lights. 2d. Those relating to fog signals; and 3d. Those relating to the steering of the vessel, and the precautions to be observed on approaching another vessel. We propose to treat of these under separate heads, to consider what the rule of the maritime law is, and then the changes that have been made by statutes in this country and in England, here merely stating that the statutes which now regulate the matter in this country are the acts of 1864<sup>3</sup> and 1867,<sup>4</sup> and the rules established in accordance with an act passed in 1852,<sup>5</sup> so far as these are not in conflict with the act of 1864.<sup>6</sup>

The first article of the act of 1864 is a general one, applicable alike to the three divisions above mentioned, and we shall therefore state it first.

*Article I. In the following rules every steamship which is under sail, and not under steam, is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.*

We shall see that, under the Trinity House Rules of 1840, a steamer with a vessel in tow is not considered by the court

<sup>1</sup> The *Vianna*, Swabey, Adm. 405.

<sup>2</sup> *Newell v. Norton*, 3 Wallace, 267.

<sup>3</sup> Act of 1864, c. 69, 13 U. S. Stats. at Large, 58.

<sup>4</sup> Act of 1867, c. 83, 14 U. S. Stats. at Large, 411.

<sup>5</sup> Act of 1852, c. 106, 10 U. S. Stats. at Large, 72. The rules mentioned will be stated hereafter.

<sup>6</sup> See act of 1867, *supra*.

as standing in the same light towards a sailing vessel as a steamer unincumbered.<sup>1</sup> It seems to be supposed by one writer that as the present rules make no distinction in terms between a steamer towing and one unincumbered, the present statute has changed the law in this respect.<sup>2</sup> However the rule may be in England, in this country a steamer with a vessel in tow would probably be considered as standing on the same footing as any other steamer, for such is held to be the maritime law in this country.<sup>3</sup>

### 1. *Lights.*

By the maritime law there was no regularly established rule that vessels should carry lights.<sup>4</sup> In England in 1848, the Lords of the

<sup>1</sup> See *post*, p. 584, n. 1.

<sup>2</sup> Lowndes, *Law of Collisions*, 43. See also *The David Cannon*, Holt, 235.

<sup>3</sup> *New York Transp. Co. v. Philadelphia Steam Nav. Co.* 22 How. 461.

<sup>4</sup> By the maritime law whether a vessel should have a light or not, was generally a question of fact, to be decided by all the evidence in each particular case, whether the omission of a light constituted negligence. Thus Dr. *Lushington*, in *The Rose*, 2 W. Rob. 4, said: "It has been discussed over and over again in former cases of this kind, and I believe there is no occasion in which it has been laid down as a general principle that merchant vessels ought constantly to carry lights. Under certain circumstances undoubtedly it may be right and expedient to do so." Similar language is used by him in the case of *The Swea*, 4 Notes of Cases, 97, note; and in that of *The Sarah*, 4 Notes of Cases, 98, note. He cited and affirmed the above also in *The Iron Duke*, 2 W. Rob. 377. In this case a large steamer, on a dark night, in a part of the channel constantly navigated by vessels, ran into and sunk a brig. The latter had no lights. It was held that she was not bound to carry lights, and that the steamer was to blame in going at full speed on such a night in such a locality. The decision seems hardly consistent with that of *The Victoria*, decided by the learned judge a few years later, and reported in 3 W. Rob. 49. In that case a vessel at anchor without a light was run into. Dr. *Lushington*, addressing the Trinity Masters, said: "If you are of opinion that the carrying and exhibiting such a light would have tended to prevent the collision, I cannot but think that it was a duty imposed upon him to have done so, and for this reason, that all persons are bound to take due and proper care to avoid an accident, and no man can justly complain of an accident that happens to himself, if by reasonable care and proper precaution he could have prevented it." The Trinity Masters were of opinion that, looking to the period of the year, the state of the night, and the number of vessels likely to be in the neighborhood of her, it was her duty, under such a combination of circumstances, to have had a light burning. In *The Saxonia*, in P. C., Lush. Adm. 410, a case which was decided by the principles of the maritime law, the court speaking of a sailing vessel under way said: "She is nevertheless bound to show some proper

Admiralty directed that government steamships should, between sunset and sunrise, carry a bright white light at the foremast and sufficient light, in sufficient time to enable the steamship, or other vessel whose duty it is to give way, to avoid any collision. No blame can attach to any vessel for running foul of another vessel, if it has been impossible to distinguish it until the collision was inevitable. This is not a question of green or red light, but of no light at all. . . . It cannot be admitted as any excuse for this omission that several hours previously, and owing to severe weather, the glass had got broken and the light extinguished, or so dimmed as to be indiscernible at any distance, and we concur in the opinion of the learned judge of the admiralty court that she cannot recover against another vessel if, in consequence of that misfortune, she gave the other vessel no means of seeing her in reasonable time to avoid her." See also *The Olivia*, Lush. Adm. 497, where it was held that by the maritime law a fishing vessel was bound to show a light to a vessel approaching. In *The Clyde*, 2 Spinks, Adm. 27, the master of a vessel without lights saw a light, but did not know whether it was a light on shore or not, for some time. As soon as it was ascertained what the light was, he showed a light. Held, he was not in fault. See also *The Scioto*, Daveis, 359; *Lenox v. Winisimmet Co.* 1 Sprague, 160. In *Kelly v. Cunningham*, 1 Calif. 365, it was held that if ordinary prudence required a vessel, lying in the roadstead of San Francisco, to carry a light, a general custom for vessels in the harbor to neglect to do so was no excuse. See also *Innis v. Steamer Senator*, 1 Calif. 459. And in *The Indiana*, Abbott, Adm. 330, and *Hain v. Steamboat North America*, U. S. D. C. South. Dist. of N. Y., 2 N. Y. Leg. Obs. 67, it was held that a vessel at anchor in the harbor, or in a navigable river, must show a light. See also *Rogers v. Steamer St. Charles*, 19 How. 108. In this case the light had been taken down just previous to the collision, in order that the water which had collected on the glass globe might be wiped off. The vessel was nevertheless held to be in fault. In *Carsley v. White*, 21 Pick. 254, the court instructed the jury that whether the plaintiffs ought to have had a light or not, depended on all the circumstances of the case. The vessel was lying in the harbor of Provincetown. See also *The New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420, 429. It was also held in *The Santa Claus*, 1 Blatchf. C. C. 370, that, where a vessel on a dark night, the weather being thick and cloudy, carried but one light, and thereby led those on board of another vessel to suppose that she was at anchor, and a collision consequently took place, the vessel was guilty of negligence. The necessity of having a light was strongly enforced by Mr. Justice Grier, in the case of *The Barque Delaware v. Steamer Osprey*, 2 Wallace, C. C. 268, 275, 1 Am. Law Reg. 15. The Osprey ran into the barque Delaware; the steamer had lights but the barque had not. Mr. Justice Grier said: "The court cannot establish any rule to bind vessels navigating the high seas, after night, to carry signal lights; but when one party does this, and the other does not, we can and will treat (in a case *cæteris paribus*) the dark boat as the wrong-doer." And Judge Kane, in the same case, said: "I should be very glad to follow in the wake of the first admiralty judge, who would hold the absence of a properly placed and well-trimmed lantern to be *prima facie* evidence of a culpable want of caution." See also Jacobsen's Sea Laws, 310. Gibson, C. J. in

head, a green light on the starboard bow, and a red light on the port bow. It was also recommended that all other steamers should

Simpson v. Hand, 6 Whart. 311, 324, said: "Indeed, the hoisting of a light is a precaution so imperiously demanded by prudence, that I know not how the omission of it could be qualified by circumstances any more than could the leaving of a crate of china in the track of a railroad car, or how it could be considered otherwise than as negligence *per se*." See also *The Oratava*, 5 Month. Law Mag. 45; *The Columbine*, 2 W. Rob. 27, 33; *Steamboat Blue Wing v. Buckner*, 12 B. Mon. 246; *Ward v. Armstrong*, 14 Ill. 283. In *Culbertson v. Shaw*, 18 How. 584, Mr. Justice *McLean* states the law as follows: "Where a boat is anchored in the path of vessels, a light is indispensable; but it is not required where the boat is fastened to the shore, especially at a place set apart for such boats." See also *Ure v. Coffman*, 19 How. 56; *The Granite State*, 3 Wallace, 310. In *Cushing v. The John Fraser*, 21 How. 184, 189, it was held that where the port regulations required a light the vessel was obliged to have one while in that port, and the court also said: "But apart from the regulations of the local authorities, we think the *James Gray* was in fault upon the established principles of maritime law. She was at anchor at a place where vessels were continually passing. It was her duty, therefore, to show, at night, the usual signal-light of a vessel at anchor, — that is, a globe lamp, or one without any dark side to it, which could be seen from any direction, and hung high enough in the rigging to be seen at a distance." In *Nelson v. Leland*, 22 How. 48, it was held that a flatboat on the Yazoo river ought to have one or more fixed lights, and that a torch made of split pine boards was not sufficient. In the case of *Brainerd v. Steamer Worcester*, U. S. D. C. Conn., Boston Daily Advertiser, Sept. 12, 1856, Judge *Ingersoll* held, "that by the maritime law, a vessel lying at anchor in a track frequented by other ships is bound to exhibit an *efficient* light, an *effective* light, sufficient to warn other vessels approaching of the position in which she is anchored. That a light hung in the port fore rigging of a vessel at anchor with her sails up, and so as to be obscured and eclipsed by the sails, from the view of a steamer approaching on the starboard side, so far as respects such steamer so approaching, is no sufficient light within the meaning of the maritime law." In *The Thomas Martin*, 3 Blatchf. C. C. 517, Mr. Justice *Nelson* held, that even if vessels were not bound to carry lights generally, still when approaching each other they were bound so to do. And in *The R. B. Forbes*, 1 Sprague, 330, *Sprague, J.*, used the following language: "There is no imperative rule that required her to show a light. But if traversing these waters in the night time, where steamers may be expected, she omitted to do so, she ought not to recover damages against the steamer, if the latter had a good lookout." See also the language of *Ware, J.*, in *The Steamer City of New York*, U. S. D. C. Mass., Boston Courier, Dec. 10, 1857. But see *The Pilot Boat Blossom*, Olcott, Adm. 188; *The Steamboat Neptune*, id. 483. In *New York Steamship Co. v. Calderwood*, 19 How. 241, which was a case of a collision between a sailing vessel and a steamer, the sailing vessel had no light. The court were of opinion, upon the evidence in the case, that this did not indicate negligence, but said: "But that the case may not be misunderstood, we assert that the ruling

carry the same lights. In 1852,<sup>1</sup> the Lords of the Admiralty, in pursuance of power given by the act of 14 & 15 Vict. c. 79, issued regulations applicable to British vessels.

As to steamers the rules were substantially the same as those now in force.<sup>2</sup> There was no separate provision for steamers when towing. Sailing vessels were required "when under sail,<sup>3</sup> or being towed,<sup>4</sup> approaching,<sup>5</sup> or being approached by any other vessel," "to

principle of the court is, that an obligation rests upon all vessels found in the avenues of commerce to employ active diligence to avoid collisions, and that no inference can be drawn from the fact that a vessel is not condemned for an omission of certain precautionary measures in one case, that another vessel will be excused, under other circumstances, for omissions of the same description." In the case of *The Steamer Louisiana v. Fisher*, 21 How. 1, a collision occurred in Chesapeake Bay between a steamer and a sailing vessel. The latter had no light, and it was contended that she ought to have shown one. The court said: "In the present case, we have not been able to discover any fact that imposed the obligation upon the schooner to do so. The night was moonlight; and though the light was occasionally obscured, the evidence does not show that it was so to a degree that rendered the navigation of the bay at all dangerous, if care, skill, and vigilance had been employed upon the different vessels." See also *Baker v. Steamship City of New York*, 1 Clifford, C. C. 84. In *The Hypodame*, 6 Wallace, 216, a propeller on the Hudson river made a sudden sheer and ran into a schooner. The schooner had no light, and the propeller had not a proper lookout. Held that the propeller was alone in fault. *Grier, J.*, after citing the language used by him in the case of *The Osprey*, *supra*, said: "But the case cited applies to vessels meeting in the same line, where one party can plainly see the other and yet keeps dark; but where the danger of collision is the consequence of a sudden or unexpected change of course, which produces a sudden peril and leaves no time to the sailing vessel to display a light before a collision, or to do more than shout, — where the steamboat, if it had a sufficient lookout, might easily have avoided the collision, it has no right to complain or demand that the damages should be divided, as where both are in fault."

<sup>1</sup> Swabey, Adm. App. i, 8 Moore, P. C. 168.

<sup>2</sup> In *The Sylph*, 2 Spinks, Adm. 75, one light of a steamer called the *Meteor* had gone out, and she was consequently taken for a vessel at anchor. Dr. *Lushington* said: "Though the *Meteor* may not be in any degree to blame for the light going out, — for I apprehend lights will go out at sea as well as elsewhere, it might be an accident, yet it is the same as regards the other party as if it had arisen from negligence, — she must suffer the consequences of the light going out, if she misled the *Sylph*." See *The Swanland*, 2 Spinks, Adm. 107.

<sup>3</sup> In *The City of London*, Swabey, Adm. 245, a smack of sixty tons, hove-to under foresail and jib, reefing her mainsail, was considered a vessel under sail.

<sup>4</sup> *The Unity*, Swabey, Adm. 101.

<sup>5</sup> See *The Ceres*, Swabey, Adm. 250.

show between sunset and sunrise, a bright light,<sup>1</sup> in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision. Sailing vessels at anchor in roadsteads or fairways were required to exhibit, between sunset and sunrise, a constant bright light at the masthead,<sup>2</sup> except within harbors or other places where regulations for other lights for ships were legally established. The lantern to be used when at anchor, both by steam vessels and sailing vessels was to be so constructed as to show a clear, good light all round the horizon.

The 14 & 15 Vict. c. 79, was repealed by the Merchants' Shipping Act of 1854, but it was held that these regulations were not thereby repealed,<sup>3</sup> and they continued in force until 1858, when they were revoked and new rules were established.<sup>4</sup>

These make no change as to steamer's lights, except that steam vessels under sail are not to carry a masthead light. Sailing vessels

<sup>1</sup> In *The Mangerton*, Swabey, Adm. 120, a bright signal-lamp, showing three lights, a bright light in the front, a green light on the starboard side, and a red light on the port side, was fastened to the bowsprit end. This was held not to be in accordance with the regulations. See also *The Urania*, Swabey, Adm. 253. In *Mackay v. Roberts*, 9 Moore, P. C. 357, a schooner of 116 tons burden exhibited a light in a lantern, with a candle of eight to the pound, which was hung at the forestay, four or five feet above the deck. There was also a binnacle light. This was held a sufficient compliance with the regulation imposing a duty on "sailing vessels approaching or being approached by any other vessel, to show a bright light in such a position as can be seen by such vessel, and in sufficient time to avoid the collision." A "bright light" was held to be such a light as vessels of the same class as the one in question usually carried. The light must not only be shown, but continued, until the danger is past. *Dowell v. The Gen. Steam Nav. Co.* 5 Ellis & B. 195, 32 Eng. L. & Eq. 158, 38 Eng. L. & Eq. 64. If the fact of there not being lights is not noticed in the pleadings and arguments, the court will take notice of it, and neither party can recover. *The Aliwal*, 1 Spinks, 96, 25 Eng. L. & Eq. 602.

<sup>2</sup> In *Valentine v. Cleugh*, 8 Moore, P. C. 167, 29 Eng. L. & Eq. 49, it was held that a light in the port mizen rigging was not sufficient, it being not so readily seen there as in the place prescribed. See *Whittel v. Crawford*, Exch. 1856, 37 Eng. L. & Eq. 466.

<sup>3</sup> *The Mangerton*, Swabey, Adm. 120.

<sup>4</sup> Swabey, Adm. App. vi. For the authority to make these rules, see 17 & 18 Vict., c. 104, § 295. In *The Olivia*, Lush. Adm. 497, it was held that the regulations of 1852 were wholly repealed by those of February, 1858, and that by the regulation of October, 1858, fishing vessels were exempt from carrying colored lights. It was also held that by the maritime law they were bound to show a light to a vessel approaching.



whether under way<sup>1</sup> or being towed, are to "exhibit" between sunset and sunrise the same lights<sup>2</sup> as a steamer, except the masthead light. The lights are to be "fixed" whenever it is practicable so to exhibit them,<sup>3</sup> and when they cannot be fixed "as in the case of small vessels in bad weather," they shall be kept on deck between sunset and sunrise, ready for instant exhibition, and shall be exhibited in such manner as can be best seen on the approach of, or to, any other vessel, in sufficient time to avoid collision. Sailing pilot-vessels are required to carry only a white light at the masthead, and to exhibit a flare-up light every fifteen minutes. The provision as to vessels at anchor is the same as that now in force, except that the phrase "All sea-going vessels" is used instead of "Ships, whether steamships or sailing ships."

In 1862, new rules and regulations were established by the Merchants' Shipping Act Amendment Act.<sup>4</sup> This act also gave the Queen power from time to time, on the recommendation of the Ad-

<sup>1</sup> A vessel driven from her anchors by a gale of wind and setting sail to get out to sea, even if wholly unmanageable, is under way within this section. *The George Arkle*, in P. C., Lush. Adm. 382.

<sup>2</sup> In *The City of Carlisle*, Brow. & L. Adm. 363, the Master of the Rolls said: "The learned judge of the admiralty court, in his judgment in the court below, stated his understanding of the regulation to be 'not that there is any positive order that the lights shall be fixed on the actual sides of the ship itself, but that the green light shall be exhibited on the right hand, and the red light on the left hand, so as to be visible.' He also stated that the substance of the regulation is 'that the lights shall be fairly visible as described: there is no order that the lights shall be fixed in any peculiar manner, or in any particular part of the ship.' 'And the whole question is, whether taking the description of the manner in which these lights in the present case were fixed, they were so fixed as to be fairly visible.' With these observations their Lordships concur entirely." In this case the lights on a brig were placed on the top of the galley, which was three feet aft of the foremast. The galley was six feet high and seven feet broad. The lights were about six inches from the outer edge, and about seven feet from the side of the vessel. The lights were not obscured by the foresail. *Dr. Lushington* held that the lights were not in a proper place, but the Privy Council were of the opposite opinion.

<sup>3</sup> The burden is on the vessel not carrying the colored light fixed, to prove that it was impracticable to do so. *The Calla*, Swabey, Adm. 465; *The Livingstone*, Swabey, Adm. 519. In *The Aurora*, Lush. Adm. 327, the vessel sued had lost her lights by tempestuous weather. It appearing, however, that she had afterwards been in the Downs a week, and had had communication with the shore, the court held that the master should have obtained new lights.

<sup>4</sup> 25 & 26 Vict. c. 63.

miralty and Board of Trade, by an order in council to annul or modify any of these regulations, or to make new ones, and declared that any alterations in or additions to such regulations made in manner aforesaid shall be of the same force as the regulations in the said schedule. On the 9th January, 1863, the provisions of this act were modified by an order in council,<sup>1</sup> which is now in force. Our act of 1864 is identical in its terms with the provisions established by this act and order in council, with the exception of a few verbal changes.

In this country an act was passed in 1838, making it the duty of the master and owner of every steamboat "to carry one or more signal-lights, that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars."<sup>2</sup> And in 1849, an act was passed which provided that "vessels, steamboats and propellers, navigating the northern and western lakes," shall during the night "show" a light, those on the starboard tack a red light and those on the larboard tack a green light; "vessels going off large<sup>3</sup> or before the wind, or at anchor, a white light." Steamboats and propellers are to carry on the stem, or as far forward as possible, a triangular light, at an angle of about sixty degrees with the horizon; on the starboard side, "a light shaded green," and on the larboard side red. "Said lights shall be furnished with reflectors, &c. complete, and of a size to insure a good and sufficient light."<sup>4</sup> There are also various State statutes and harbor regulations on this subject at several ports.<sup>5</sup>

<sup>1</sup> Lush. Adm. App. 72.

<sup>2</sup> Act of 1838, c. 191, § 10, 5 U. S. Stats. at Large, 306. See *Waring v. Clarke*, 5 How. 465; *The Santa Claus*, Olcott, Adm. 428; *Bullock v. Steamboat Lamar*, U. S. C. C. Georgia, 1844, 8 Law Rep. 275.

<sup>3</sup> A vessel under way with the wind abaft the beam is "going off large." *The Buffalo*, 1 Newb. Adm. 115.

<sup>4</sup> Act of 1849, c. 105, § 5, 9 U. S. Stats. at Large, 382. See *Foster v. Sch. Miranda*, 1 Newb. Adm. 227, 6 McLean, C. C. 221; *Chamberlain v. Ward*, 21 How. 548.

<sup>5</sup> See *Rathbun v. Payne*, 19 Wend. 399. There is also a statute which provides that steamboats shall carry lights. See *Fitch v. Livingston*, 4 Sandf. 492; *The Santa Claus*, Olcott, Adm. 428, 1 Blatchf. C. C. 370. In *Fitch v. Livingston*, it was held that a steam propeller licensed as a coaster, going up the Hudson, on a voyage from Philadelphia to Albany, was bound to comply with the laws of the State through whose waters she was passing. In *The Santa Claus*, which was a similar case, the vessel was held to be in fault in not carrying two lights, not so

In 1852, an act was passed which applies to vessels "propelled in whole or in part by steam, and carrying passengers," and was intended, as its title states, to provide for the better security of the lives of passengers on such vessels. One section of this act<sup>1</sup> makes it the duty of the supervising inspectors "to establish such rules and regulations to be observed by all such vessels in passing each other, as they shall from time to time deem necessary for safety."

On the 17th of October, 1857, the following rules were adopted by the board of supervising inspectors, and it was ordered that they should take effect from and after January 1, 1858.

#### STEAMER'S LIGHTS, TO PREVENT COLLISION AT NIGHT.

##### RULE SEVENTH.<sup>2</sup>

*When under Way.* All steamers rigged for carrying sail must carry a bright white light at the foremast head, and all other steamers must carry a bright white light on the *stem* or near the bow, and another on a mast near the stern, or on the flagstaff at the *stern*, the last-named being at an elevation of at least twenty feet above all other lights upon the steamer. All steamers must carry a green light upon the starboard side, and a red light on the port side.<sup>3</sup>

much on the law of the State as on a usage of the river. In *Halderman v. Beckwith*, 4 McLean, C. C. 286, it was held that a State had no power to pass a law regulating the mode in which vessels should pass each other on waters within the limits of the State, when the vessels did not belong to the State. This case was carried up to the Supreme Court of the United States, and that court was equally divided. It has been held in a recent case, that the statutes of a State only apply to cases which come before the courts of the State, and that in a case before the Federal courts, which administer the general admiralty law, they will not be regarded. The vessel which disregarded the statute was a foreign ship, at anchor at the time of the collision in the port of New York. *Steamboat New York v. Rea*, 18 How. 223. An exception to the general rule thus laid down is stated by the learned court to be that the States have the right to pass laws regulating vessels while in the harbors and ports of a State. But this seems inconsistent with the decision.

In *Cushing v. The John Fraser*, 21 How. 184, it was held that a city ordinance respecting the place where a vessel might lie in the harbor, the time she might remain there, and what light she must show at night, was valid.

It is provided also in Vermont, that vessels on Lake Champlain shall carry lights. Rev. Stats. of Vermont, tit. xxii. ch. 92, p. 422.

<sup>1</sup> Act of 1852, c. 106, § 29, 10 U. S. Stats. at Large, 72.

<sup>2</sup> The first six rules relate to steering, and will be stated hereafter.

<sup>3</sup> The *Ottawa*, 3 Wallace, 268.

2 NOTE. — Steamers, although rigged for carrying sail, instead of the foremast head-light, may adopt the forward and stern lights provided for steamers *not* rigged for carrying sail; provided said lights are so arranged and placed on the vessel as to secure the contemplated objects.

*When at Anchor.* A bright white light at least twenty feet above the surface of the water. The lantern so constructed and placed as to show a good light all around the horizon.

FIRST. The masthead light of steamers rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the lantern to be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the ship.

SECOND. The stem and stern lights of steamers not rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the respective lanterns to be so constructed that the stem light shall show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the ship, and that the stern light shall show a uniform light all around the horizon.

THIRD. The colored side lights to be visible at a distance of at least two miles in a clear dark night, and the lanterns to be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, namely: from right ahead to two points abaft the beam on their respective sides.

FOURTH. The side lights are to be fitted with inboard screens of at least *six feet* in length (clear of the lantern), to prevent them from being seen across the bow. The screens to be placed in a fore and aft line with the inner edge of the side lights, and in contact therewith.

NOTE FIRST. The object of carrying the bright white light at the foremast head of steamers rigged for carrying sail is merely to intimate to other vessels the approach or presence of such steamer.

NOTE SECOND. The object of the colored lights required to be carried on *all* steamers is to indicate to other vessels the course or direction such steamers may be steering.

NOTE THIRD. The object of requiring steamers not rigged for car-

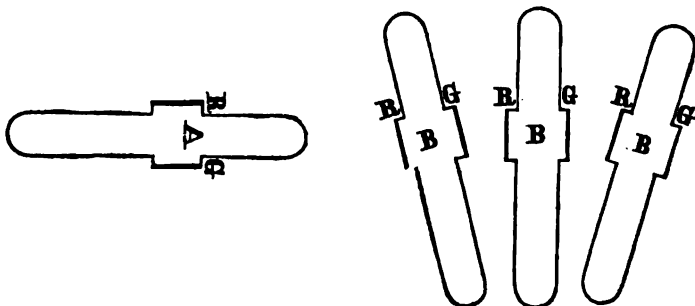
rying sail to carry a white stern light in connection with a white light on the stem or near the bow, is to provide (when the vessel's rig will admit of it) a method of determining, by a central range of lights, more correctly the course that such vessel is running.

#### DIAGRAMS.

The following diagrams are intended to illustrate the working of the above system of colored lights, and are to be used by pilots in connection with the rules, as sailing directions on meeting or nearing other steamers:—

##### FIRST SITUATION.

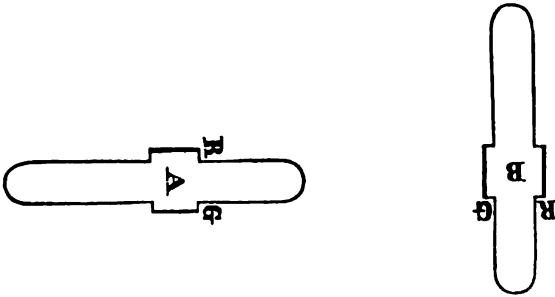
In this situation the steamer A will only see the *red light* of the steamer B, in whichever of the three positions the latter may happen to be, because the *green light* will be hid from view. A will be assured that the larboard side of B is towards him, and that the latter is therefore crossing the bows of A *in some direction to port*. A will therefore (if so near as to fear collision) port his helm with confidence, and pass clear. On the other hand, the steamer B, in either of the three positions will see both the *red* and *green* lights of A, by which the former will know that a steamer is approaching *directly* towards him. B will act accordingly, and keep away if necessary.



##### SECOND SITUATION.

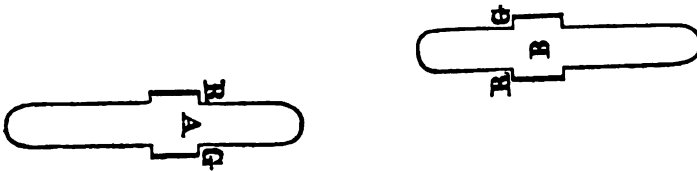
Here A will see B's *green light* only, which will clearly indicate to the former that B is crossing to starboard. Again, both the colored lights of A being visible to B, will apprise the latter that a steamer is steering *directly* towards him. If necessary, A shall

starboard his helm, and if so near as to fear collision, the boat shall be slowed and stopped.



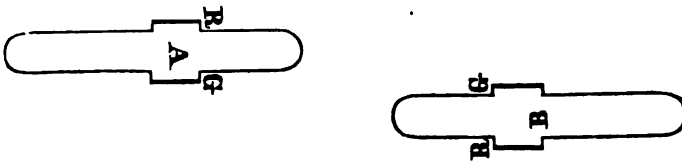
THIRD SITUATION.

A and B will see each other's *red light* only, the screens preventing the *green lights* from being seen. Both vessels are evidently passing to *port*, which is ruleable in this situation, each pilot having previously signified his intention by *one* blast of the steam-whistle.



FOURTH SITUATION.

Here the *green light* only will be visible to each, the screens preventing the *red light* from being seen ; they are therefore passing to *starboard*, which is ruleable in this situation, each pilot having previously signified his intention by *two* blasts of the steam-whistle.



FIFTH SITUATION.

This is a situation requiring great caution. The *red light* of B in view to A, and the *green light* of A in view to B, will inform

both that they are approaching each other in an oblique direction. A should put his helm to *port*, according to the standing rule mentioned in the next, or sixth situation, and pass astern of B, while B should continue on his course, or keep away if necessary to avoid collision ; each having previously given *one* blast of the steam-whistle, as required by the rule when passing to the right.



SIXTH SITUATION.

7. Here the *two* colored lights, visible to each, will indicate their *direct* approach ("head and head") towards each other. In this situation it is a *standing rule* that both shall put their helms to *port* and pass to the right, each having previously given *one* blast of the steam-whistle. But when, *for good reason*, a pilot finds it necessary to deviate from the *standing rule* just stated, he shall give early notice of such intention to the pilot of the other steamer by giving *two* blasts of the steam-whistle, and the pilot of the other vessel shall answer promptly with *two* blasts of his whistle, and both boats shall pass to the *left*, as shown in the fourth situation.



The manner of fixing the colored lights should be particularly attended to. They will require to be fitted, each with a *screen* of wood or canvas on the *inboard* side, and close to the light, in order to prevent *both* being seen at the same moment from any direction but that of *right ahead*.

This is important, for without the *screens* any plan of bow lights would be ineffectual as a means of indicating the *direction of steering*.

This will be readily understood by a reference to the preceding illustrations, where it will appear evident that in any situation in which two vessels may approach each other in the dark, the colored lights will instantly indicate to both the *relative course of each*, — that is, each will know whether the other is approaching directly, or crossing the bows, either to *starboard* or *port*.

This intimation, with the signals by whistle, as provided, is all that is required to enable vessels to pass each other in the darkest night, with almost equal safety as in broad day, and for want of which so many lamentable accidents have occurred.

(It might prove of infinite service, combined with the above plan of steamers' lights, if all sailing vessels were provided with a *green* and *red lantern*, to be shown by hand on the starboard or port bow, according to the side on which the vessel might be approaching. *If at anchor*, all vessels without distinction should exhibit a *bright white light*, at least twenty feet above the surface of the water.)

Lest the above rules should be considered as repealed by the act of 1864,<sup>1</sup> Congress in 1865<sup>2</sup> provided that all vessels navigating the bays, inlets, rivers, harbors, and other waters of the United States, except vessels subject to the jurisdiction of a foreign power and engaged in foreign trade, and not owned in whole or in part by a citizen of the United States, shall be subject to the navigation laws of the United States; and all vessels propelled in whole or in part by steam, and navigating as aforesaid, shall also be subject to all rules and regulations consistent therewith established for the government of steam vessels in passing, as provided in the twenty-ninth section of the above act of 1852. In 1867,<sup>3</sup> the act of 1865 was amended by adding a proviso to this section, which does not however, relate to collision.

Articles Two to Nine inclusive, of the act of 1864, relate to lights, and are as follows: —

#### LIGHTS.

*Article 2. The lights mentioned in the following articles, and no others, shall be carried in all weathers between sunset and sunrise.*

<sup>1</sup> Act of 1864, c. 69, 13 U. S. Stats. at Large, 58.

<sup>2</sup> Act of 1865, c. 234, 14 U. S. Stats. at Large, 227.

<sup>3</sup> Act of 1867, c. 83, 14 U. S. Stats. at Large, 411.



## LIGHTS FOR STEAMSHIPS.

*Article 8. All steam vessels<sup>1</sup> when under way shall carry—*

*(a) At the foremast head, a bright white light, so fixed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, viz: from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.*

*(b) On the starboard side, a green light, so constructed as to throw an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.*

*(c) On the port side, a red light, so constructed as to show a uniform, unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.*

*(d) The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.<sup>2</sup>*

The Act of 1866,<sup>3</sup> provides that the above provisions for a foremast

<sup>1</sup> The English regulations include only "sea-going steamships." In *The City of Paris*, before the Admiralty Court of Ireland, Holt, 19, the objection was taken that the steam-tug was not a sea-going steamer. The Judge said that this was answered by the admission that the collision occurred on the seas, and also by the fact that the word "sea" meant only "water" as contra-distinguished from land. "And the gathering together of the waters called He sea," was cited.

<sup>2</sup> *The City of Paris*, Holt, 15; *The Lady of the Lake*, Holt, 38.

<sup>3</sup> Act of 1866, c. 234, § 11, 14 U. S. Stats. at Large, 228. In *The Glaucus*, U. S. D. C. Mass., Lowell, J., a steamer bound from New York to Boston came into collision with a sailing vessel on Long Island Sound. The steamer had, in addition to her side lights, two white lights, one at her bow and one at her mast-head. It was contended that she should have had only one white light. Lowell, J., speaking of the act of 1866, said: "Its language does not seem to be very happily chosen. It puts ocean steamers and steamers carrying sail in one class, with one sort of lights, and coasting steamers in another with a different sort, whereas most of the coasting steamers on the Atlantic coast are both ocean going, and carrying sail, so that it may sometimes be difficult for the persons concerned to know to which order they belong." The point was not decided.

head light for steamships shall not be construed to apply to other than ocean-going steamers, and steamers carrying sail. River steamers navigating waters flowing into the Gulf of Mexico, shall carry the following lights, viz: one red light on the outboard side of the port smoke-pipe, and one green light on the outboard side of the starboard smoke-pipe; these lights show both forward and aft, and also abeam on their respective sides. All coasting steamers, and those navigating bays, lakes or other inland waters, other than ferry-boats, and those above provided for, shall carry the red and green lights as prescribed for ocean-going steamers; and in addition thereto, a central range of two white lights, the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel; the head light to be so constructed as to show a good light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel, and the after light to show all around the horizon.

#### LIGHTS FOR STEAM-TUGS.

*Article 4. Steamships, when towing other ships, shall carry two bright white masthead lights vertically, in addition to their side lights, so as to distinguish them from other steamships. Each of these masthead lights shall be of the same construction and character as the masthead lights which other steamships are required to carry.*<sup>1</sup>

#### LIGHTS FOR SAILING SHIPS.

*Article 5. Sailing ships under way or being towed shall carry the same lights as steamships under way,<sup>2</sup> with the exception of the white masthead lights, which they shall never carry.*

#### EXCEPTIONAL LIGHTS FOR SMALL SAILING VESSELS.

*Article 6. Whenever, as in the case of small vessels during bad*

<sup>1</sup> The Zephyr, Holt, 24.

<sup>2</sup> The Hattie Ross, U. S. D. C. Conn., 1866, Shipman, J.; Kelly v. Thompson, U. S. D. C. Mass., 1867, Lowell, J.

As to the obligation of a vessel to show a light to a vessel coming up astern, see *The Lena*, Holt, 215; *The Evangeline*, Holt, 222.

In *The Gustav*, Holt, 28, a brig was held in fault for not having her colored lights properly placed. They were on stands secured to the paul-bitts of her windlass. See also *The Sea Nymph* of Chester, Holt, 34; *The Lady of the Lake*, Holt, 38; *The Smales*, Holt, 40; *The Maria*, Holt, 105; *The Fanny Buck*, Holt, 193.

*weather, the green and red lights cannot be fixed, these lights shall be kept on deck on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side.*<sup>1</sup>

*To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.*

#### LIGHTS FOR SHIPS AT ANCHOR.

*Article 7. Ships, whether steamships or sailing ships, when at anchor<sup>2</sup> in roadsteads or fairways<sup>3</sup> shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and un-*

<sup>1</sup> The *Tuscar*, Holt, 44.

<sup>2</sup> In *The Willard Saulsbury*, U. S. D. C. Mass., Lowell, J., a steam-tug was moored to a boom which was anchored. Held, that the tug was anchored within the meaning of this term in the statute.

<sup>3</sup> In *The Willard Saulsbury*, *supra*, a dredging machine was at work in the Narrows in Boston Harbor, under the direction of the Lighthouse Board; to protect the machine, part of the channel was inclosed by a boom, behind which was a steam-tug which was employed to tow the mud-scow. The tug had no watch on deck and no lights set. A schooner coming up the Narrows ran into the tug. It was contended that the tug was not in a fairway. Lowell, J., said: "A roadstead is a place where vessels usually anchor, and a fairway is where they usually pass and repass. That the Narrows are a fairway, which from the depth of water is resorted to by more than half of all the vessels that come to or leave Boston, notwithstanding its narrowness, cannot be disputed. Independently of the boom, the spot where the tug lay is a part of the fairway. . . . Some of the libellants' witnesses say that the tug was inside of the ordinary track of vessels coming up or down the Narrows; but on full examination it appeared that they mean only that vessels would ordinarily try to keep near mid-channel if they could and had room enough, and that most of them would probably succeed. Not that many might not go inside, but that most would not in fact do so. This has no tendency to show that this spot was not a part of the fairway. . . . It is in vain to say that this schooner, if she had made the straightest and best course from some point where she had been a few minutes before to some other point whither she was going, would not have passed over this spot; if it was a part of the thoroughfare through which vessels pass, it was within the statute." Held, that the tug was in fault.

*broken light visible all around the horizon, and at a distance of at least one mile.*<sup>1</sup>

#### LIGHTS FOR PILOT VESSELS.

*Article 8. Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light every fifteen minutes.*

#### LIGHTS FOR FISHING VESSELS AND BOATS.

*Article 9. Open fishing boats and other open boats shall not be required to carry side-lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on the one side and a red slide on the other side, and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side. Fishing vessels and open boats when at anchor, or attached to their nets, and stationary,<sup>2</sup> shall exhibit a bright white light. Fishing vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient.*

### 2. Rules Governing Fog Signals.

In England in 1858<sup>3</sup> an order was passed by the Admiralty commissioners obliging all sea-going steam vessels when their steam is up, and when under way, in all cases of fog to use as a fog signal a steam-whistle, placed before the funnel at not less than eight feet from the deck, to be sounded once at least every five minutes. When steam is not up, a fog-horn or bell as required for sailing vessels. Sea-going sailing vessels were required when under way, in cases of fog, to use when on the starboard tack a fog-horn, and when on the port tack to ring a bell. The signals to be sounded once at least in every five minutes.

By the Merchants' Shipping Act of 1862, and by the order in Council of 1863, these rules were simplified by doing away with the distinction between vessels on the port and starboard tacks, and these rules are now in force.

<sup>1</sup> The Palestine, Holt, 52.

<sup>2</sup> See The Lloyds, Holt, 55.

<sup>3</sup> Swabey, Adm. App. vi.

Before the statute of 1864 was passed, the Supreme Court of the United States seems to have been of the opinion that a fog-horn on a vessel at anchor was of but little use as a signal to an approaching steamboat.<sup>1</sup> The present rules are as follows:—

*Article 10. Whenever there is a fog,<sup>2</sup> whether by day or night, the fog signals described below shall be carried and used, and shall be sounded at least every five minutes, viz:—*

*(a) Steamships under way shall use a steam-whistle placed before the funnel, not less than eight feet from the deck.*

*(b) Sailing ships under way shall use a fog-horn.*

*(c) Steamships and sailing ships when not under way shall use a bell.<sup>3</sup>*

### 3. *Steering and Sailing Rules.*

#### RULES OF THE MARITIME LAW.

By the maritime law a vessel going free must get out of the way

<sup>1</sup> *McCready v. Goldsmith*, 18 How. 89. See s. c. *nom.* *The Bay State*, Abbott, Adm. 235.

<sup>2</sup> In *The Monticello*, U. S. D. C. Mass., 1867, *Lowell, J.*, a steamer and a sailing vessel came into collision in the night time. It was admitted that the sailing vessel did not sound her fog-horn, but it was disputed whether there was a fog. The witnesses for the sailing vessel admitted that there was a haze, mist, or smoke. *Lowell, J.*, said: "What is a fog such as the statute intends? Is it every haze by day or night, of whatever density? To give the statute a reasonable interpretation we must suppose that its intent is to give to approaching vessels a warning which the fog would otherwise deprive them of. By day there must be fog enough to shut out the view of the sails or hull, or by night of the lights, within the range of the horn, whistle, or bell. This in my judgment must be the meaning: that a safeguard of practical utility under the circumstances is to be provided. If it be entirely plain upon the evidence that the ordinary signals are sufficient and decidedly more efficacious than the horn could be, the horn will not be required. But a serious doubt upon this point must weigh against the vessel failing to comply with the statute. I do not consider it to be enough to aver and prove that the lights might be seen in time to avoid serious danger. But that where it is evident that the fog signal could not have been so useful as the ordinary signal, it need not be used. Thus, if the lights could be plainly and easily made out at a mile, and the fog-horn could not be heard at a third or a quarter of that distance, I cannot suppose that such a state of the atmosphere would amount to a fog, in the sense of the law. It is to guard against some danger which the fog would or might cause, and from which the horn might possibly guard."

<sup>3</sup> *The Lloyds*, Holt, 55.

of one close-hauled,<sup>1</sup> and the one close-hauled must keep her course.<sup>2</sup> If both are close-hauled, the vessel on the starboard tack keeps her course, while the one on the port tack gives way.<sup>3</sup> If both vessels have the wind free and are approaching on nearly the same course, each should put its helm to port.<sup>4</sup> It has been said that if two vessels are going the same way, the one to windward is to “keep

<sup>1</sup> *Bentley v. Coyne*, 4 Wallace, 509; *The Dumfries*, in Privy Council, Swabey, Adm. 125, reversing s. c. Swabey, Adm. 63; *The Belle*, U. S. D. C. N. Y., 1867, *Shipman, J.* (The collision occurred in 1862.) *The Woodrop Sims*, 2 Dods. 83; *Jameson v. Drinkald*, 12 J. B. Moore, 148; *The Harriett*, 1 W. Rob. 182; *The Baron Holberg*, 3 Hagg. Adm. 244; *Handaysyde v. Wilson*, 3 Car. & P. 528; *Vennall v. Garner*, 1 Crompt. & M. 21, 3 Tyrw. 85; *The Chester*, 3 Hagg. Adm. 316; *The Rebecca*, 1 Blatchf. & H. Adm. 347; *Allen v. Mackay*, 1 Sprague, 219; *The Clement*, 1 Sprague, 257, affirmed in Circuit Court, 2 Curtis, C. C. 363; *The Clara M. Porter*, U. S. D. C. Mass., Jan. 1856, *Ware, J.*, 18 Law Rep. 678; *The Brig Emily, Olcott*, Adm. 132; *The Pilot Boat Blossom*, id. 188; *The Sloop Argus*, id. 304; *The John Stuart*, 4 Blatchf. C. C. 444. In *Williams v. Gutch*, 14 Moore, P. C. 202, the collision took place at night, in the middle of the Atlantic, between an English and an American vessel. The Chancellor was on the starboard tack, close-hauled. The Egyptian was on the port tack, with the wind four points free. When the light of the E. was seen the C. put her helm to starboard to get more full, and fell off half a point, then kept close-hauled until within two hundred yards, when the helm was put hard to starboard to lessen the blow. The E., as soon as the light of the C. was seen, was to windward, and put her helm hard-a-port. Held, that she should not have ported. The court said: “Here the Egyptian had the wind four points free; she was bound, therefore, to make way for the other. She was able to make her own election, whether she would attempt to pass to windward or to leeward of the opposite vessel. She might have starboarded her helm and gone four points nearer the wind. The Chancellor was unable to do this, for she was going as close to the wind as she could. In *The Zollverein*, Swabey, Adm. 96, an English vessel on the port tack was run into by a foreign vessel with the wind free. The collision might have been avoided by the English vessel porting her helm; but the court held that she was not in fault by the maritime law for not doing so, although by the English statute she should have ported in such a case.

<sup>2</sup> *Sch. Catharine v. Dickinson*, 17 How. 176; *Sills v. Brown*, 9 Car. & P. 601; *Handaysyde v. Wilson*, 3 C. & P. 528. See *Bentley v. Coyne*, 4 Wallace, 509.

<sup>3</sup> *The North American*, Swabey, Adm. 358; *The Jupiter*, 3 Hagg. Adm. 320; *The Brig Cynosure*, U. S. D. C. Mass., 7 Law Rep. 222; *Bark St. John, v. Bark Mary Bannatyne*, Vice Adm. Court, Lower Canada, 18 Law Rep. 528; *The Thomas Martin*, 3 Blatchf. C. C. 517.

<sup>4</sup> *Dictum* in *Williams v. Gutch*, 14 Moore, P. C. 202. In *St. John v. Paine*, 10 How. 581, it is said that in such a case “the vessel on the larboard tack must give way, and each pass to the right.” But we apprehend that the vessel on the starboard tack should also port her helm, in such a case, by the maritime law.

away.”<sup>1</sup> That this is inaccurate is certain, for to keep away might bring her in collision with the other. The expression intended was probably “keep out of the way.”

As a general rule if two vessels are going the same way, and one is a faster sailer than the other and overtakes her, she is bound to keep out of her way.<sup>2</sup> But the vessel astern cannot be held liable

<sup>1</sup> It is laid down by Chancellor *Kent* (3 *Kent*, 230), and in a note to *Abbott on Shipping*, p. 234, by one of the American editors, and in *Flanders on Maritime Law*, 307, that where two vessels are going the same course in a narrow channel, and there is danger that they will run afoul of each other, the vessel to the windward is to keep away. For this position *Marsh v. Blythe*, 1 *McCord*, 360, is cited. That this cannot always be correct, is manifest on a slight examination of the meaning of the term “keep away.” For, if two vessels are going the same way, on the same tack, but converging, so that if they should keep on, a collision would ensue, if the vessel to windward should keep away, that is, keep away before the wind, she would be thrown directly in the track of the other vessel. Nor is the case of *Marsh v. Blythe* an authority in point. The head note does not state the case correctly. Two vessels were bound to Charleston. One, at the time of the collision, was on the starboard tack, and the other on the port tack. It was held that the latter should have given way. It will be readily seen that this is merely an exemplification of the rule given above, that when two vessels close-hauled are approaching, the vessel on the port tack is to change her course. The head note of the case of *Steamboat Co. v. Whilldin*, 4 *Harring. Del.* 228, is also incorrect. In that case two steamboats going in opposite directions came into collision. There is not even a *dictum* in the opinion of the court in regard to the duty of vessels going in the same direction, though the rules of navigation, as given by *Kent*, are incorporated into the head note.

<sup>2</sup> The question came before the District Court of the United States for the District of Massachusetts in the case of *The Clement*, 1 *Sprague*, 257. A brig and a pilot boat, schooner rigged, were sailing on the same tack, on converging courses. The brig was to windward and had the wind two points free. The pilot boat was close-hauled. The two vessels kept their respective courses, and the pilot boat, being the faster sailer, overtook the brig and struck her on the lee bow. The court applied the rule applicable to vessels approaching each other, and held that the brig, having the wind free, should have avoided the pilot boat. It was also said that if both had been close-hauled, and the convergency had been caused by the schooner's being able to lie nearer the wind, the brig would not have been in fault. This case was affirmed in the Circuit Court. 2 *Curtis*, C. C. 363. On appeal to the Supreme Court, the judges were equally divided.

We are unable to see, so clearly as we could desire, that the decisions in the district and circuit courts are altogether correct. It seems to have been taken for granted that the general rule as to vessels approaching each other applied to the case of a vessel astern, and the faster sailer overhauling and running into the other. If such a proceeding may be justified by the fact that the one astern

for not complying with this rule if the night is so dark that the vessel ahead cannot be seen.<sup>1</sup>

If two steamboats are going in the same direction, the one ahead is entitled to keep her course, and the one astern, if she attempts to pass, must avoid a collision.<sup>2</sup>

And the same rule has been applied where the one ahead was a sailing vessel, and the one astern was towed by a steamer.<sup>3</sup>

If two steamboats are approaching each other in such a direction that there is danger of a collision, each should go to the right.<sup>4</sup>

was close-hauled, and the one ahead had the wind free, then it would seem to follow that, on the road, a carriage might run into one ahead, and justify itself by saying that it had kept to the right "as the law directs."

This case, moreover, appears to have been virtually overruled by a late decision of the Supreme Court of the United States. It was there held that where a vessel astern, in an open sea and in good weather, is sailing faster than the one ahead and pursuing the same general direction, if both vessels are close-hauled on the wind, the vessel astern, as a general rule, is bound to give way, or to adopt the necessary precautions to avoid a collision. The rule is said to rest on the principle that the vessel ahead, in that state of facts, has the sea-way before her, and is entitled to hold her position, and consequently the vessel coming up must keep out of the way. Mr. Justice *Clifford*, in delivering the opinion of the court, said: "Remarks are certainly to be found in the opinion of the court in the case of *The Clement*, 17 Law Rep. 444, which are inconsistent with the proposition here laid down. That case was appealed to the circuit court, and was there affirmed. But the remarks to which we refer were not necessary to the decision of the cause, and we think they must be received with some qualifications." *Whitridge v. Dill*, 23 How. 448. So in *The Ann Caroline*, 2 Wallace, 538, it was held that where two vessels were beating up a channel, both on the port tack, and the one which was to the windward and ahead kept on her course, while the other went about on the starboard tack, and came into collision with the first, that the first was not in fault, since if she had ported her helm she would have run into the other, and she could not go about on account of a reef of rocks.

<sup>1</sup> *The Morning Light*, 2 Wallace, 550.

<sup>2</sup> *The Rhode Island*, *Olcott*, Adm. 505, affirmed 1 Blatchf. C. C. 363; *The Governor*, *Abbott*, Adm. 108. See also *Ward v. Sch. Dousman*, 6 McLean, C. C. 231.

<sup>3</sup> *The Carolus*, 2 Curtis, C. C. 69.

<sup>4</sup> *New York Transp. Co. v. Philadelphia Steam Nav. Co.* 22 How. 461; *Union Steamship Co. v. New York Steamship Co.* 24 How. 307; *The Niagara*, 3 Blatchf. C. C. 37; *The Steamboat Washington*, U. S. D. C. *Ingersoll*, J., 12 N. Y. Leg. Obs. 163; *Wheeler v. The Eastern State*, 2 Curtis, C. C. 141; *The Santa Claus*, *Olcott*, Adm. 428, 1 Blatchf. C. C. 370; *Lockwood v. Lashell*, 19 Penn. State, 344. In *Ward v. The Ogdensburg*, 1 Newb. Adm. 139, it was held that the rule did not apply, where, if each should keep its course, there would be no possibility of a collision. But in *Wheeler v. The Eastern State*, *supra*, it was held not to be enough for the party who departs from the rule to show that they would not have



When a steamer meets a sailing vessel close-hauled, the sailing vessel must keep on her course and the steamer must avoid her if there is danger of a collision,<sup>1</sup> and according to the American rule the steamer may go either to the right or left of a sailing vessel with the wind free, but this rule is objectionable in some respects, and we think the English rule, formerly in force, requiring her to go to the right, is to be preferred.<sup>2</sup> The English rule was adopted

gone clear, but he must show that the other party ought to have perceived there was no probable chance of collision by so doing.

A propeller with a barge in tow is not within the rule which applies to sailing vessels, and which requires steamers to keep out of their way, but a propeller in such a condition when meeting a steamer should keep to the right. *New York Transp. Co. v. Philadelphia Steam Nav. Co.* 22 How. 461. See also *The William Hunter*, Holt, 163.

<sup>1</sup> *The Saxonia*, Lush. Adm. 410; *The Cleadon*, Lush. Adm. 158; *St. John v. Paine*, 10 How. 557; *Newton v. Stebbins*, id. 586; *Lowry v. Steamboat Portland*, 1 Law Rep. 313; *Hawkins v. Dutchess Steamboat Co.* 2 Wend. 452; *The Genesee Chief v. Fitzhugh*, 12 How. 443; *New York U. S. Mail S. Co. v. Rumball*, 21 How. 372; *Wakefield v. Steamer Governor*, 1 Clifford, C. C. 93; *The R. B. Forbes*, 1 Sprague, 328; *The 4 Blatchf. C. C. Kentucky*, 325; *The Empire State*, 1 Bened. Adm. 57; *Sanderson v. Columbus*, 10 Phil. L. J. 268, 8 Leg. Int. 31; *Lyle v. The Conestoga*, 11 Phil. L. J. 183, 8 Leg. Int. 154; *Mellon v. Smith*, 2 E. D. Smith, 462; *The Steam-Tug Wm. Young*, Olcott, Adm. 38; *The Steamboat Narragansett*, Olcott, Adm. 246; *The Steamboat New Jersey*, id. 415; *The Steamboat Neptune*, id. 483; *The Washington Irving*, Abbott, Adm. 336. The sailing vessel is, however, only obliged to keep her course when there is some immediate danger of collision. *The Propeller Monticello v. Mollison*, 17 How. 152; *Peck v. Sanderson*, id. 178; *Baker v. Steamship City of New York*, 1 Clifford, C. C. 82.

In the *Sylph*, Swabey, Adm. 233, a vessel was held to be justified in starboard-ing her helm on seeing a steamer's green light between three and four points on her starboard bow, and afterwards porting on seeing the red light.

<sup>2</sup> We have seen that, when two sailing vessels going free meet, each must pass to the right; and as a steamer is considered in the light of a vessel going free, it would seem to follow that when she meets a sailing vessel free, the same rule should apply. And it was so held by Dr. *Lushington*, in the case of *The City of London*, 4 Notes of Cases, 40. The rule, as laid down by him, has been followed by the Vice Admiralty Court of Lower Canada, in the case of *The Inga*, decided July 31, 1855, 18 Law Rep. 285, and is supported by a writer in the *London Law Magazine*, vol. 53, p. 52. See also *The Louisiana*, U. S. D. C. Maryland, 6 Adm. Law Reg. 422. Judge *Sprague*, on the other hand, in the case of *The Osprey*, 1 Sprague, 245, decided that in such a case the sailing vessel was bound to keep on her course, and the steamer could go either to the right or to the left to avoid her. This decision proceeds on the ground that wherever an inequality exists, the vessel having the advantage is to keep out of the way, and

by statute in 1854,<sup>1</sup> but this statute is now repealed, and as we shall see hereafter, the steamer may now go on either side. Generally, a steamer going on a customary route should keep in her usual track.<sup>2</sup> When a sailing vessel is drifting with the current, it the other must keep on her course. He says the expression that a steamer is considered as a vessel with the wind free is only applicable to the case of steamers meeting vessels close-hauled. He also cites four cases as bearing on the point. *St. John v. Paine*, 10 How. 557; *Newton v. Stebbins*, id. 586; *The Leopard*, Davis, 193; *The Northern Indiana*, 16 Law Rep. 433. The *Leopard*, perhaps, supports the position contended for, but the others are cases of steamers and vessels close-hauled. There is a *dictum* of Mr. Justice Nelson, in *St. John v. Paine*, to the effect that a steamer is always to avoid a sailing vessel, whether close-hauled or with the wind free. For this several English cases are cited, but none of them support that branch of the proposition relating to vessels with the wind free. This *dictum* is cited with approbation in the case of *The Northern Indiana*, and is supported by an article in the *Law Reporter*, vol. 18, p. 181. The rule established by Dr. Lushington seems to rest on the principle (which appears to be reasonable), that the inequality between a steamer and a vessel going free, provided she be not on a tack, is in reality so little, that it does not counterbalance the propriety and superior advantages of each doing its part to avoid the collision. In accordance with this view it was held, in *Ward v. Armstrong*, 14 Ill. 283, in a case of collision between a steamboat and a schooner, that as the latter was running large before the wind, she was nearly as much in command as the steamer, and as she saw the latter several miles off, and might have given her a wide berth, the law would not consider the steamer in fault, since there was reasonable care on her part. See also *The New Champion*, Abbott, Adm. 202. But in a recent case before the Supreme Court of the United States, the law as laid down by Judge Sprague has been established. The *Steamer Oregon v. Rocca*, 18 How. 570. The court put their decision entirely on the ground that the general rule of law is, that a steamer, meeting a sailing vessel, must avoid her, and that when a general rule is laid down, it is practically rendered ineffectual by admitting exceptions to it. A collision occurred on Long Island Sound during the summer of 1857, which illustrates the superiority of the English to the American rule. Two steamers were approaching each other in the night time, and one was thought to be a sailing vessel; consequently, the other, in the exercise of its privilege, went to the left, but as the first went to the right they came into collision. Had the English rule been observed, the misapprehension on the part of the steamer would have been productive of no ill results.

In the *Western Metropolis*, U. S. D. C., N. Y. 1867, *Shipman, J.*, the collision occurred between a steamer and a sailing vessel with the wind free, in February, 1864. The steamer gave one long whistle, and starboarded her helm, the sailing vessel ported. Held, she was in fault for not keeping her course.

<sup>1</sup> The Merchants' Shipping Act of 17 & 18 Victoria, c. 104, § 206; *The Mangerton*, Swabey, Adm. 120.

<sup>2</sup> *The Bay State*, 3 Blatchf. C. C. 48; *The Vanderbilt*, 6 Wallace, 225; *New York and Virginia Steamship Co. v. Calderwood*, 19 How. 241.

is the duty of a steamboat to avoid her, although the vessel is in the usual track for steamboats.<sup>1</sup> The same rule applies to a steamer meeting a flat-boat which has no means of propulsion, but which drifts with the current.<sup>2</sup>

If a collision ensue between two steamboats at their place of departure, both leaving the same slip at the same time, both will be considered to be in fault. But if one starts first, the other must wait till the former gets under way.<sup>3</sup> And if the boats are running in opposition to each other, both will be presumed to be in fault, unless it is clearly shown that one is not to blame.<sup>4</sup> Evidence that a boat was racing is admissible to show negligence on her part.<sup>5</sup> It has been held that if a raft is driven by the wind into the channel of a river so as to obstruct it, the master of a steamboat has no right to destroy it, as being a nuisance, if it has not remained there an unreasonable time, and exertions are being made to remove it by the owners of it.<sup>6</sup>

If two steam-tugs are approaching a vessel from different directions, in order to secure the contract of towing her into harbor, it has been held that the established rule is that the steamer which is following in the wake of the vessel should come up on the starboard quarter and slack her engine, whilst the steamer which is approaching from the opposite direction should round to either to windward or leeward, so as to head the same way as the vessel.<sup>7</sup>

A ferry boat plying across a navigable river is bound to remain in her slip, notwithstanding her regular hour of leaving has arrived, if any vessel is seen, or is in a position to be seen, from on board of her, with which she will be in danger of coming into collision if she goes out;<sup>8</sup> but she is not bound to lie waiting the expected arrival of another vessel.<sup>9</sup>

<sup>1</sup> *Saune v. Tourne*, 9 La. 428; *Fretz v. Bull*, 12 How. 466. See also *Fashion v. Wards*, 6 McLean, C. C. 152; *Ward v. The Sch. Dousman*, id. 231; *Butterfield v. Boyd*, 4 Blatchf. C. C. 356.

<sup>2</sup> *Pearce v. Page*, 24 How. 228.

<sup>3</sup> *The Steamboat Boston*, Olcott, Adm. 407.

<sup>4</sup> *The Steamboat Boston*, Olcott, Adm. 407.

<sup>5</sup> *Myers v. Perry*, 1 La. Ann. 372.

<sup>6</sup> *Lallande v. Steamboat C. D. Jr.* 1 Newb. Adm. 501.

<sup>7</sup> *Sturgis v. Clough*, 21 How. 451. See *s. c. nom. The R. L. Maybey*, 4 Blatchf. C. C. 88.

<sup>8</sup> *The Favorita*, 1 Bened. Adm. 30.

<sup>9</sup> *The Columbus*, Abbott, Adm. 384. See also *Randolph v. The United States*, 1 Newb. Adm. 497.

And it is culpable negligence in a ferry-boat to run on a dark night through a crowded harbor, relying solely on a brass compass, which would not traverse so well as a wooden one which was on board at the time.<sup>1</sup>

A ferry-boat, running between New York and Brooklyn, is justified in running on a very cold night, when the East River is full of broken and running ice, and if she cannot get into her slip, she is not obliged to return to the opposite shore, but may attempt to land her passengers at another place on the same side as her obstructed slip.<sup>2</sup>

When a vessel is entering a harbor, she is bound to exercise great care and diligence.<sup>3</sup> The ordinary rules of navigation are binding upon vessels meeting pilot boats;<sup>4</sup> and also on vessels in the fishing business, on their fishing grounds.<sup>5</sup>

If a ship at anchor and one in motion come into collision, the presumption is, that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been.<sup>6</sup> The rule of law is the same where a vessel aground<sup>7</sup> or one lying at a

<sup>1</sup> *Lenox v. Winnisimmet Company*, 1 Sprague, 160.

<sup>2</sup> *The Brooklyn*, 1 Bened. Adm. 365.

<sup>3</sup> *Culbertson v. Shaw*, 18 How. 584, 587; *Ward v. The Sch. Dousman*, 6 McLean, C. C. 231.

<sup>4</sup> *The Clement*, 2 Curtis, C. C. 363; *The Pilot Boat Blossom*, Olcott, Adm. 188.

<sup>5</sup> *The Sch. Summit*, 2 Curtis, C. C. 150.

<sup>6</sup> *The Lochlibo*, 3 W. Rob. 310, 1 Eng. L. & Eq. 651. In this case the *Lochlibo* came into collision with a vessel at anchor. Dr. *Lushington* said: "As the *Lochlibo* ran into a vessel which was incapable of helping herself, it is her duty to prove, in order to exonerate herself from the blame, that the collision arose from circumstances which it was utterly out of her power to prevent, or that it was the fault of the pilot on board, or that it arose from the default of those on board the *Aberfoyle*." "*Primâ facie*, as was properly and wisely admitted by the counsel, the *Lochlibo* is to blame for having run down a vessel at anchor." See also *The Bothnia*, Lush. Adm. 52; *The Peerless*, id. 30; *The Palestine*, Holt, 52; *The George*, 2 W. Rob. 386, 4 Notes of Cases, 161, 9 Jur. 670; *The Massachusetts*, 1 W. Rob. 371; *The Batavier*, 10 Jur. 19, 4 Notes of Cases, 356, s. c. *nom. Netherlands Steamboat Co. v. Styles*, 9 Moore, P. C. 286; *The Scioto*, Daveis, 359; *The Victoria*, 3 W. Rob. 49; *The Girolamo*, 3 Hagg. Adm. 169, 173; *The Eolides*, 3 Hagg. Adm. 367; *Culbertson v. Shaw*, 18 How. 584; *Steamboat New York v. Rea*, 18 How. 223; *The Julia M. Hallock*, 1 Sprague, 529; *Dunn v. McComb*, 11 La. Ann. 325.

<sup>7</sup> *Kelsey v. Barney*, 2 Kern. 425. In this case a vessel lay aground across the channel of a harbor, where vessels had never before been known to ground or obstruct the passage, and not being discovered was run into; held, that the de-

wharf, is run into.<sup>1</sup> A vessel is held in fault if she contributes to a collision by being anchored in an improper place.<sup>2</sup> But whether she be in a proper place or not, and whether properly or improperly anchored, the other vessel must avoid her if it be practicable, and consistent with her own safety.<sup>3</sup> If a vessel is at anchor, another must not anchor so near as to cause damage to her.<sup>4</sup> And if a vessel is moored alongside of another at a wharf, she is responsible for all injuries resulting from her proximity, which human skill or precaution could have guarded against.<sup>5</sup>

In a late case in Massachusetts, a schooner loaded with coal arrived at the end of a wharf. At the wharf on the other side of the dock a brig was discharging ballast. The dock at or near the end of the wharves was narrower than further up. The schooner, fearing there was not room for her to pass, requested the brig to haul further up the dock. This was done, and the schooner hauled partly in, and then grounded in the narrowest part of the dock. The brig then being ready for sea, though warned of the danger, attempted to pass, and got stuck between the schooner and the wharf. When the tide fell both vessels were damaged. It was held that the brig was in fault.<sup>6</sup>

A vessel in stays is said by Dr. Lushington to be almost in the same predicament as a vessel at an anchor. If a vessel claims that she was in stays, she must in the first instance prove it; the defendant was not necessarily in fault, although those in charge of his vessel, by their utmost vigilance, might have seen the plaintiff's vessel in time to have stood off. The question was held to be, whether on all the facts of the case the defendant was guilty of negligence.

<sup>1</sup> *The Granite State*, 3 Wallace, 310.

<sup>2</sup> *Street v. Foster*, 1 How. 89; *The Scioto*, Daveis, 359; *The Marcia Tribou*, 2 Sprague, 17. See *O'Neil v. Sears*, 2 Sprague, 52.

<sup>3</sup> Per Dr. *Lushington* in the case of the *Batavier*, 10 Jur. 19. See also *Cummins v. Spruance*, 4 Harring. Del. 315; *Knowlton v. Sanford*, 32 Maine, 148; *The Marcia Tribou*, 2 Sprague, 17; *O'Neil v. Sears*, 2 Sprague, 52.

<sup>4</sup> *Griswold v. Sharpe*, 2 Calif. 17; *The Volcano*, 2 W. Rob. 337, 3 Notes of Cases, 210. In this case the vessel had taken due precautions against ordinary perils, and no accident would have occurred but for a hurricane, which drove her from her moorings and caused the collision. She was held liable: See also *The Sidskjalf*, Swabey, Adm. 117.

<sup>5</sup> *Vantine v. The Lake*, 2 Wallace, C. C. 52. See also *Steamboat United States v. Mayor*, 5 Mo. 230; *Inman v. Funk*, 7 B. Mon. 538; *Beane v. The Mayurka*, 2 Curtis, C. C. 72; *The Bark Lotty*, Olcott, Adm. 329.

<sup>6</sup> *The Stromness*, U. S. D. C. Mass., *Lowell*, J.

den of proof then shifts, and the other vessel must show that the first was improperly put in stays, or that the collision was an inevitable accident.<sup>1</sup>

If a vessel chooses to avail herself of a particular mode of going down a river, as by warping, at a particular time which renders it difficult to escape collision, if a collision does take place, she must bear the consequences of a contingency to which she has exposed herself.<sup>2</sup>

If a vessel is out of ordinary safe trim, so that she will not mind her helm so well as a ship in ordinary safe trim, and thus contributes to the collision, the owners are responsible; but if she is in ordinary safe trim, then although she might have been in handier trim, and although the trim of the ship in part contributed to the collision, they are not responsible.<sup>3</sup>

If a vessel about to get under way is so near to a vessel at anchor that there is danger of a collision, she should notify such vessel of her intention to get under way.<sup>4</sup>

Steamboats have great power and speed, and are always obliged to observe a great degree of caution, particularly at night. They must be very watchful as to their speed and course. In regard to the former, it is a question of fact in each particular case whether the speed was excessive or not; and in determining this, the locality and hour, the state of the weather, and all circumstances of a similar nature, are to be fully considered.<sup>5</sup> It has been held

<sup>1</sup> The *Sea Nymph*, Lush. Adm. 23. In this case Dr. *Lushington* said: "In the present instance you will, I think, agree with me, that it is clearly proved that the *Civility* was in stays at the time of the collision. The question then is, Did the mate of the *Civility*, who was in charge of the ship, take the proper precautions before throwing his ship in stays? Did he take a due look around him beforehand to ascertain that no ship was in his neighborhood likely to come upon him? or do you think that the *Civility* was put in stays without adequate care and caution to prevent a collision?"

<sup>2</sup> The *Hope*, 2 W. Rob. 8.

<sup>3</sup> The *Argo*, Swabey, Adm. 462.

<sup>4</sup> *O'Neil v. Sears*, 2 Sprague, 52.

<sup>5</sup> The *Europa*, 2 Eng. L. & Eq. 557, 564; The *Northern Indiana*, 16 Law Rep. 433, 3 Blatchf. C. C. 92; The *James Adger*, 3 Blatchf. C. C. 515; The *Florida*, 4 id. 470; The *Gazelle*, 2 W. Rob. 515; The *Iron Duke*, 2 W. Rob. 377; The *Virgil*, 2 W. Rob. 201; The *Bay State*, Abbott, Adm. 235, s. c. *nom.* *McCready v. Goldsmith*, 18 How. 89; *Steamboat New York v. Rea*, 18 How. 223; *Brainard v. Steamer Worcester*, U. S. D. C. Conn., Boston Daily Advertiser, Sept. 12,

to be no excuse for an excessive speed, that the steamer could not otherwise fulfil a contract for the carriage of the mail.<sup>1</sup> If a steamboat, in consequence of excessive speed, raises so great a swell that a vessel is sunk thereby, the owners are liable.<sup>2</sup> A steamer, when hailed in a fog, should reverse her engines, and stop her headway as much as possible.<sup>3</sup> The same precautions should be taken when a vessel is seen, but her course is doubtful.<sup>4</sup> And if a steamer intends to come to anchor on account of the darkness of the night, and to do so must starboard her helm, she should ease her engines, and proceed with great caution.<sup>5</sup>

There must be a competent and skilful officer in charge of the deck, and if it appears that the unskilfulness or want of the necessary qualifications contributed to the collision, the vessel under his charge will be considered in fault.<sup>6</sup>

By the maritime law, sailing vessels when under way,<sup>7</sup> as well

1856; *Rogers v. Steamer St. Charles*, 19 How. 108. If the by-laws of a place forbid vessels going over a certain rate of speed in the adjacent waters, it is no excuse in case of collision that the colliding vessel was going at a rate within the limits of the rule, if such rate were dangerous at the time. *Netherlands Steamboat Co. v. Styles*, Privy Council, 40 Eng. L. & Eq. 19, 25. In *The Sylph*, 4 Blatchf. C. C. 24, two steamboats came into collision in a dense fog in the harbor of New York. Both were going at the rate of five knots an hour, which it appeared was the usual rate there during a fog. Held, that neither was in fault.

<sup>1</sup> *The Rose*, 2 W. Rob. 1; *The Vivid*, Swabey, Adm. 88; *The Northern Indiana*, 16 Law Rep. 433, 3 Blatchf. C. C. 92; *Rogers v. Steamer St. Charles*, 19 How. 108, 112; *The James Adger*, 3 Blatchf. C. C. 515.

<sup>2</sup> *Netherlands Steamboat Co. v. Styles*, Privy Council, 40 Eng. L. & Eq. 19. See also *Smith v. Dobson*, 3 Man. & G. 59, where the damage was caused partly by the swell of a steamer which had already passed, and the defendant was held liable.

<sup>3</sup> *The Perth*, 3 Hagg. Adm. 414; *The Hypodame*, 6 Wallace, 216.

<sup>4</sup> *The Birkenhead*, 3 W. Rob. 75; *The James Watt*, 2 W. Rob. 270; *The Hermann*, 4 Blatchf. C. C. 441; *Steamer Louisiana v. Fisher*, 21 How. 1; *Nelson v. Leland*, 22 How. 48; *The Despatch*, Swabey, Adm. 138; *The Saxonia*, Lush. Adm. 410; *The Sylph*, 2 Spinks, Adm. 75; *The Northern Indiana*, 16 Law Rep. 433, 447; *Ward v. The Ogdensburg*, 1 Newb. Adm. 139, s. c. *nom.* *Chamberlain v. Ward*, 21 How. 548.

<sup>5</sup> *The Ceres*, Swabey, Adm. 250.

<sup>6</sup> *Chamberlain v. Ward*, 21 How. 548, 564; *Haney v. Baltimore*, S. P. Co. 23 How. 287. See *Union Steamship Co. v. New York Steamship Co.* 24 How. 307, 314.

<sup>7</sup> *The Ann Caroline*, 2 Wallace, 538; *Whitridge v. Dill*, 23 How. 448; *The City of Carlisle*, Brow. & L. Adm. 363; *The Presto*, Holt, 103; *The Maria*, Holt, 105; *The Flora*, Holt, 114; *The Warrenton*, U. S. D. C. Mass., *Lowell, J.*; *The Mar-*

as when at anchor,<sup>1</sup> should have a sufficient watch or lookout on deck; and this rule applies with greater force to steamers under way. It is not enough that a person is stationed in the pilot house of a steamer as a lookout, but a vigilant watch should be stationed in the forward part of the steamer, so situated as to be able to discern vessels at the earliest moment.<sup>2</sup> If, however,

*cia Tribou*, 2 Sprague, 17; *The Brig Emily*, Olcott, Adm. 132; *The Pilot Boat Blossom*, id. 188; *The Rebecca*, 1 Blatchf. & H. Adm. 347; *The Clement*, 1 Sprague, 267, 2 Curtis, C. C. 363, 369; *The Chester*, 3 Hagg. Adm. 316; *The Diana*, 1 W. Rob. 131. But it has been held not to be improper conduct on the part of the officer of the deck to take the helm himself and to trust the lookout to a common sailor. *The Pilot Boat Blossom*, *supra*. In *The Vianna*, Swabey, Adm. 405, a vessel was held in fault for not noticing an intended launch. *Quære*, how far a sailing vessel is bound to keep a lookout for vessels coming up from astern. *The Emma*, Holt, 209. A usage that vessels while reefing take all hands for this purpose, cannot be admitted to contravene the rule requiring a lookout. *Sch. Catharine v. Dickinson*, 17 How. 177. The proper position for a lookout is generally forward, but reference must be had in all cases to the question whether the lookout could not see as well where he was, as in any other position. *The Morning Light*, 2 Wallace, 558.

<sup>1</sup> *The Marcia Tribou*, 2 Sprague, 17; *O'Neil v. Sears*, 2 Sprague, 52; *The Indiana*, Abbott, Adm. 330. But if the collision was not owing to the absence of a watch, the vessel will not be considered in fault. *Mellon v. Smith*, 2 E. D. Smith, 462. In *The Sch. Lion*, 1 Sprague, 40, a vessel at anchor in the harbor of Provincetown was run into by another vessel which had broken from her moorings, no person being on board. Held, that the latter had omitted a reasonable and ordinary measure of security, and that the collision was owing to this neglect, notwithstanding a usage at Provincetown to leave vessels owned in that place, and manned by persons residing there, at anchor in the harbor without any person on board. The vessel run into did not belong in Provincetown.

<sup>2</sup> *St. John v. Paine*, 10 How. 557, 587; *Newton v. Stebbins*, 10 How. 586; *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443; *The Northern Indiana*, 16 Law Rep. 433, 447, 3 Blatchf. C. C. 92; *The James Adger*, 3 Blatchf. C. C. 515; *Baker v. Steamship City of New York*, 1 Clifford, C. C. 84; *Ward v. The Ogdensburgh*, 1 Newb. Adm. 139, s. c. *nom. Chamberlain v. Ward*, 21 How. 548; *New York & Baltimore T. Co. v. Philadelphia Steam Nav. Co.* 22 How. 461; *Haney v. Baltimore Steam Packet Co.* 23 How. 287; *The Clyde*, 2 Spinks, Adm. 27; *The Steamboat New York v. Rea*, 18 How. 223; *Goslee v. Shute*, id. 463; *Netherlands Steamboat Co. v. Styles*, Privy Council, 40 Eng. L. & Eq. 19. In the case of *The Europa*, 2 Eng. L. & Eq. 557, it was held, that a steamer going at the rate of twelve and a half knots an hour in a dense fog, seven hundred miles from land, must have the most complete lookout that can be adopted. It was in evidence that the usual lookout in cases of difficulty and of dense fog was an officer on the foremost bridge, another at the conn, a



the want of a lookout does not contribute to the collision, the vessel is not in fault in this respect for not having one.<sup>1</sup> So there must be a proper officer on deck to give the necessary directions and orders.<sup>2</sup>

If a vessel on a tack wishes to change her course, she should do so by going about, and not by wearing, if there are other vessels near.<sup>3</sup> The general rule is that a sailing vessel should beat out

quartermaster at the wheel and a second hand in the wheel-house, and lastly, two lookouts on the topgallant fore-castle. In the present case, the lookouts being merely one on the bridge, a quartermaster on the topgallant fore-castle, one at the wheel, and another at the conn, it was held that no sufficient lookout was kept. In *The Wirral*, 3 W. Rob. 56, the *Trinity Masters* were of opinion that the proper place for the master, or lookout man, on a ferry-boat on the river Mersey, was the bridge between the paddle-boxes. In the case of *Cushing v. The John Fraser*, 21 How. 184, 192, which came up on appeal from South Carolina, it appeared that there were two lookouts, but that, as they were negroes, they could not be examined. The court held that the owner of a colliding vessel must prove not only that there was a competent lookout, but that the lookout performed his duty, and that if he placed a person as lookout who could not be a witness, it was his own fault, and was no excuse for the absence of the requisite proof. In *The R. B. Forbes*, 1 Sprague, 328, *s. c. nom. Pope v. Steamboat, R. B. Forbes*, 1 Clifford, C. C. 346, a steam-tug was held in fault because powerful lights on board of the vessel she was towing were placed so near the bow as to prevent the lookouts from seeing ahead. See also, generally, *The George*, 4 Notes of Cases, 161; *Jameson v. Drinkald*, 12 J. B. Moore, 148; *The Shannon*, 2 Hagg. Adm. 173; *The Columbine*, 2 W. Rob. 27; *The Ericsson*, Swabey, Adm. 38. In *The Ottawa*, 3 Wallace, 268, a steamer was held in fault for not having a proper lookout. The master and helmsman were in the pilot-house. The court were of the opinion that a master who had charge of the navigation of the vessel was not a proper lookout, and that the pilot-house was not the proper place for a lookout.

<sup>1</sup> *The Louisiana*, U. S. D. C. Md., 6 Am. Law Reg. 422; *The Hattie Ross*, U. S. D. C. Conn., 1866, *Shipman, J.*

<sup>2</sup> *The Arthur Gordon*, in P. C. Lush. Adm. 270. In *The Obey*, Law Rep. 1 Adm. 102, a vessel from Monte Video put into Queenstown, took a coasting pilot and sailed thence to Leith. On the way a collision occurred at night. The deck at the time was in charge of the coasting pilot and the second mate. Held, that the master was not in fault in leaving the deck in their charge.

<sup>3</sup> *The Falkland*, in P. C. Brow. & L. Adm. 204. In *The Kingston-by-Sea*, 3 W. Rob. 152, a vessel was held in fault for not squaring her main-yard and letting the vessel pay off, when she missed stays. In *The Lady Anne*, 1 Eng. L. & Eq. 670, a vessel luffed, but did not ease off her head sheets. Held in fault. In *Red Bank Co. v. The John W. Gandy*, U. S. D. C. Penn., 7 Am. Law Register, 606, it was held that the manœuvre of fore-reaching — making a wide sweep in turning,

her tack, and then should come about with all proper dispatch upon the other tack. She is not obliged to remain in the wind for a steamer to pass her. In some cases a sailing vessel might be required to do this, but is not in the channel of Hell Gate, near New York.<sup>1</sup> A vessel about to go in stays at night should carefully observe whether there are any vessels near which may be endangered by the manœuvre.<sup>2</sup> It has been held that where a collision occurs in consequence of a third mate, at the time in charge of the deck, obeying a wrong order given by the master of the other vessel, the owners of the latter vessel cannot sustain a suit for damages.<sup>3</sup>

We shall see that steamers in a fog are required by the new rules to go at a moderate speed. Nothing is said in the rules as to the duty of sailing vessels in such a case, but the 20th article of the rules of 1864 provides that nothing in the rules exonerates a vessel from the consequences of the neglect of any precautions which may be required by the ordinary practice of seamen. It has been held that the defence of inevitable accident could not be maintained, where it appeared that the vessel setting it up was sailing with a strong breeze and under a full press of canvass, and with her studding-sails set, it being very dark and hazy at the time of the accident.<sup>4</sup> But, as has been said by the Supreme Court of the United States,<sup>5</sup> such a restriction can hardly be applied to sailing vessels proceeding on their voyage in an open sea. On the contrary the general rule is that they may proceed on their voyage although it is dark, observing all the ordinary rules of navigation, and with such additional care and precaution as experienced and prudent navigators usually so as to gain headway from the impetus acquired, instead of turning short — is not objectionable even in a harbor, unless there is some reason to apprehend collision in consequence.

<sup>1</sup> The *Empire State*, 1 Bened. Adm. 57. This case also decides that the rule requiring vessels to beat out their tacks, does not require them in all cases to go as near the shore as the depth of water will permit, without reference to the other exigencies of the channel.

<sup>2</sup> The *Flora*, Holt, 114. See The *Bolderaa*, Holt, 205; The *Oscar*, Holt, 231.

<sup>3</sup> The *Huntress*, 2 Sprague, 61.

<sup>4</sup> The *Virgil*, 2 W. Rob. 201. See also The *Thomas Martin*, 3 Blatchf. C. C. 517, where a vessel was racing.

<sup>5</sup> The *Morning Light*, 2 Wallace, 550. See also The *Ebenezer*, 2 W. Rob. 206; The *Itinerant*, id. 236.

employ under similar circumstances. They should never under such circumstances hazard an extraordinary press of sail, and in case of unusual darkness it may be reasonable to require them, when navigating in a narrow pathway, where they are liable to meet other vessels, to shorten sail if the wind and weather will permit. In a recent case, a vessel in the North Sea, going six and a half knots an hour, ran into a fishing-vessel which had her trawl down. The vessel was on a fishing ground. The night was so dark that vessels could only be seen at the distance of one to two hundred yards off. The vessel was held liable for going at so great a rate of speed at such a time and place.<sup>1</sup>

In general, established rules and known usages should be carefully followed; for every vessel has a right to expect that every other vessel will regard them; but not where they would, from peculiar circumstances, certainly cause danger, as if a vessel near a rock or shore must strike it by putting her helm to port, which the *general* rule might require; and no vessel is justified by a pertinacious adherence to a rule, for getting into collision with a ship which she might have avoided.<sup>2</sup>

<sup>1</sup> The *Pepperell*, Swabey, Adm. 12. See also *The Lloyds*, Holt, 55; *The Victoria*, 3 W. Rob. 49, 56.

<sup>2</sup> *Allen v. Mackay*, 1 Sprague, 219; *The Vanderbilt*, Abbott, Adm. 361; *The Friends*, 1 W. Rob. 478, 485, 7 Jur. 307. In *The Commerce*, 3 W. Rob. 287, it was held that where there is a probability of a collision, a vessel on the port tack, and close-hauled, is not justified in pertinaciously keeping on her course, although the vessel she meets is on the starboard tack, and with the wind free. Where practicable, she is bound to take the necessary precautions for avoiding the collision, although the other vessel is acting wrongfully in not giving way in time. See also *Bark St. John v. Bark Mary Bannatyne*, Vice Adm. Court, Lower Canada, 18 Law Rep. 528, 531; *The Hope*, 1 W. Rob. 154, 156; *The Niagara*, Vice Adm. Court, Lower Canada, June 2, 1854, 17 Law Rep. 336, 341; *The Lady Anne*, 1 Eng. L. & Eq. 670; *The Shannon*, 2 Hagg. Adm. 173; *Lowry v. Steamboat Portland*, 1 Law Rep. 313; *St. John v. Paine*, 10 How. 557; *Hahey v. Baltimore S. P. Co.* 23 How. 287; *The Ann Caroline*, 2 Wallace, 538; *Moore v. Moss*, 14 Ill. 106; *Hawkins v. Dutchess Steamboat Co.* 2 Wend. 452; *Minor v. Ship Astracan*, 2 Whart. Dig. 685; *Foster v. The Sch. Miranda*, 1 Newb. Adm. 227, 6 McLean, C. C. 221; *The Santa Claus*, Olcott, Adm. 428; *Handaysyde v. Wilson*, 3 Car. & P. 528. In the case of *The Blenheim*, 10 Jur. 79, a steamer was run into by a vessel being launched. It was held that as the steamer might have avoided the collision by going more to the north, she was liable. A view somewhat different from the general one has been recently taken by the Supreme Court of the United States. After stating

A vessel may put her helm to starboard or to port, as the case may be, when the collision is inevitable, to ease the blow, although this would not be the proper course to pursue before the collision became inevitable.<sup>1</sup>

If one vessel is in the wrong this clearly does not justify, as we have just stated, the other vessel in omitting to do anything, and it would seem to be also clear that, if she should do anything, she should do what is right, and should be held in fault if she makes a wrong manœuvre. But in some cases allowance seems to have been made for the excitement and alarm caused by the fault of the wrongdoer.<sup>2</sup> How far this is an excuse is questionable.

the general rule relating to the case of a steamer meeting a sailing vessel, the court said: "Practically, when a rule for this purpose is laid down, it is rendered ineffectual by admitting exceptions to it. The mind begins to waver as soon as the danger arises, and the exception, rather than the rule, becomes a subject of solicitude with the masters of both boats; and this practically annuls the rule, and causes the movements of both vessels to be uncertain. If the rule were absolute, and an insuperable difficulty should prevent one of the boats from observing it, it would be safer and better to slow the vessel, or stop it, until the danger shall be past. This would occur so seldom as to be inappreciable, when compared to the safety it would secure." *The Steamer Oregon v. Rocca*, 18 How. 570, 572. And Mr. Justice Curtis, in a subsequent case in the same volume, *Crockett v. Newton*, p. 581, 583, speaking of the general rule, said: "And though this rule should not be observed when the circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for obeying the rule. The court must clearly see, not only that a deviation from the rule would have prevented a collision, but that the commander of the sailing vessel was guilty of negligence, or a culpable want of seamanship in not perceiving the necessity for a departure from the rule, and acting accordingly." See also *The Sylph*, 2 Spinks, Adm. 83; *Wheeler v. The Eastern State*, 2 Curtis, C. C. 141. And, in the case of *The Test*, 5 Notes of Cases, 276, it was held that it was no defence to a vessel clearly in the wrong, that the other vessel might, by departing from the ordinary rules of navigation, have avoided the collision.

<sup>1</sup> *Bentley v. Coyne*, 4 Wallace, 509; *The Ottawa*, 3 Wallace, 274; *The Gazelle*, 2 W. Rob. 515; *The Cynosure*, U. S. D. C. Mass., 7 Law Rep. 222; *Williams v. Gutch*, 14 Moore, P. C. 202; *The Falkland*, Brow. & L. Adm. 204; *The Inflexible*, Swabey, Adm. 32; *The Ericsson*, id. 38; *The Joseph Somes*, id. 185; *The Clyde*, 2 Spinks, Adm. 27; *The John Stuart*, 4 Blatchf. C. C. 444; *The Maria*, Holt, 105; *The Tyrian*, Holt, 109; *The Calypso*, Holt, 117; *The Hannah Mary*, Holt, 119; *The Carlisle*, Holt, 121; *The Evangeline*, Holt, 222; *The Velasquez*, 4 Moore, P. C. n. s. 426; *The Brig Belle*, U. S. D. C. N. Y., *Shipman*, J. 1867. The collision occurred in 1862. See also *Baker v. Steamship City of New York*, 1 Clifford, C. C. 83.

<sup>2</sup> In *The Genesee Chief v. Fitzhugh*, 12 How. 461, a steam propeller ran into

In some of the States of this country, statutes have been passed regulating the manner in which steamboats should pass each other.

a schooner, the *Cuba*. *Taney*, C. J., in delivering the opinion of the court, said: "The captain and crew of the *Cuba* appear to have been watchful and attentive from the time the propeller was discovered. Nor do we deem it material to inquire whether the order of the captain at the moment of collision was judicious or not. He saw the steamboat coming directly upon him, her speed not diminished, nor any measures taken to avoid a collision; and if, in the excitement and alarm of the moment, a different order might have been more fortunate, it was the fault of the propeller to have placed him in a situation where there was no time for thought, and she is responsible for the consequences. She had the power to have passed at a safer distance, and had no right to place the schooner in such jeopardy that the error of a moment might cause her destruction, and endanger the lives of those on board; and if an error was committed under such circumstances, it was not a fault." See also *The Chesapeake*, 1 Bened. Adm. 23, 29. In *The Hattie Ross*, U. S. D. C. Conn., 1866, *Shipman*, J., this doctrine was applied to a case of sailing vessels, one not having lights. This one was seen, but her course not made out at once. When she was very near, the other vessel saw she was approaching and made a wrong manœuvre. Held, on the authority of the above case, that this was not a fault. So in the case of *The Brig Belle*, U. S. D. C., N. Y., 1867, where there was a collision between the *Belle*, which vessel had the wind free, and the *Tempest*, a sailing vessel close-hauled, the same principle was applied. The *Belle* saw the *Tempest's* lights in ample season to have cleared her. *Shipman*, J., said: "It was equally the duty of the *Tempest* to hold her course, and allow the *Belle* to choose which side of her she would pass. She did so, as I understand the proofs, until it became evident that a collision must take place unless something was done. She then ported her helm. Whether some other manœuvre on her part might not have proved more successful, this court will not stop to inquire. The movement was made in a moment of alarm, and of imminent and overwhelming peril,—peril into which the vessel had been brought by the fault of the *Belle* and by no fault of the *Tempest*. The error of a vessel thus brought into immediate jeopardy by the fault of another, committed in a moment of alarm, will not subject her to damages, nor prevent her recovery. This is a perfectly familiar principle, of constant application by courts of admiralty." So held also in *The Louisiana*, U. S. C. C. Md., 6 Am. Law Reg. 426, where a steamer came into collision with a sailing vessel.

This doctrine seems, however, to result from an effort to make the admiralty rule of dividing the loss conform to the harshness of the common-law principle which confines the loss to one side. It is an unquestionable principle, as we have stated, that a vessel, when a collision is inevitable, may ease the blow by any manœuvre proper for that purpose, although it tends to direct her course towards the other vessel; but to hold that because one vessel is in fault another may make a wrong manœuvre, and justify it on the ground that her officers were frightened and did not know what they were about, is a novelty in admiralty law. In *The Clyde*, 2 Spinks, Adm. 27, a steamer ran into a schooner. The steamer

In other States the usage of the river governs. The boat going with the current is generally required to keep in the middle of the stream, while the ascending boat keeps close to either shore.<sup>1</sup> In others the usage is that both ascending and descending boats shall keep to the right of the centre of the channel.<sup>2</sup> Some courts, however, seem to pay but little regard to local usages.<sup>3</sup>

was held in fault for not having a proper lookout. Just before the collision the schooner starboarded her helm. Dr. *Lushington* said: "If she starboarded her helm wisely, for the purpose of easing the blow which had become inevitable, I apprehend she would be right. If, on the other hand, that act tended to produce the collision instead of preventing it, of course she is to blame." In *Halderman v. Beckwith*, 4 McLean, C. C. 292, *McLean*, J., said: "It might appear that the plaintiff possibly could have acted more judiciously than he did to avoid the collision after the event has occurred. There is a great difference between the view at the moment of danger, under excitement, and after the event, on looking calmly at the facts. And the law adapts itself to the exigencies of the moment, making some allowance for the infirmity of human judgment — not the infirmity resulting from ignorance, or a nervous excitability, which unfits a man for such an emergency. This is one of the most important qualifications of a pilot. He must stand firmly at the helm, and look on the danger, however imminent, as the best mode of avoiding it. The highest possible degree of skill is therefore not required in a case like the present, for that is possessed by very few individuals, engaged even in the most hazardous enterprises. But there must be caution and skill, such as every one would be expected to exercise who takes upon himself the pilotage of a steam-vessel."

<sup>1</sup> *Williamson v. Barrett*, 13 How. 101; *Goslee v. Shute*, 18 How. 463; *Jones v. Pitcher*, 3 Stew. & P. 135; *Myers v. Perry*, 1 La. Ann. 372; *Drew v. Steamboat Chesapeake*, 2 Doug. Mich. 33; *Steamboat Co. v. Whilldin*, 4 Harring. Del. 228; *Moore v. Moss*, 14 Ill. 106; *Rogers v. McCune*, 19 Mo. 557; *Sinnott v. Steamboat Dresden*, 1 Newb. Adm. 474; *Bates v. Steamboat Natchez*, id. 489. In New York, steamboats navigating the East River are required by a State law to go in the middle of the river. *The Bay State*, 3 Blatchf. C. C. 48; *The E. C. Scranton*, id. 50; *The Favorita*, 1 Bened. Adm. 30; *The Bridgeport*, id. 65.

<sup>2</sup> *The Vanderbilt*, 6 Wallace, 225. See also *The Sea Nymph of Chester*, Holt, 34.

<sup>3</sup> *Wheeler v. The Eastern State*, 2 Curtis, C. C. 141; *The Clement*, id. 363, 370, Sprague, 257; *The Sch. Lion*, 1 Sprague, 40; *The E. C. 1 Scranton*, 3 Blatchf. C. C. 50; *The Topaze*, Holt, 165. In *The Western Metropolis*, U. S. D. C. New York, 1867, *Shipman*, J., a usage was set up that sailing vessels, on meeting a steamer on the Potomac river, ported their helms, if the steamer gave one whistle. On the evidence the court held that the usage was not proved, and doubted whether it would be a valid usage, if proved.

## TRINITY HOUSE RULES.

In 1840,<sup>1</sup> the Trinity House in England promulgated the following order: "Whereas the recognized rule for sailing vessels is, that those having the wind fair shall give way to those on the wind;<sup>2</sup> that when both are going on the wind the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up,<sup>3</sup> thereby passing each other on the larboard hand; that when both vessels have the wind large or abeam and meet, they shall pass each other in the same way on the larboard hand, to effect which two last-mentioned objects the helm must be put to port; and as steam vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind on either tack,<sup>4</sup> it becomes only necessary to provide a

<sup>1</sup> 1 W. Rob. 488.

<sup>2</sup> *The Speed*, 2 W. Rob. 225. In *The Commerce*, 3 W. Rob. 287, a close-hauled vessel on the port tack, and a vessel with the wind free on the starboard tack, came into collision. Both were held in fault for not giving way, the court being of the opinion that it was in the power of the close-hauled vessel to have made an effort to prevent the collision. See also *The Ann & Mary*, 2 W. Rob. 189; *The George*, 5 Notes of Cases, 36.

<sup>3</sup> *The Alexander Wise*, 2 W. Rob. 65; *The John Brotherick*, 8 Jur. 276. And it is the duty of the vessel on the port tack to give way at once, without considering whether the other vessel be one or two points to leeward. *The Traveller*, 2 W. Rob. 197. The general rule only applies when the two vessels are directly opposing each other, and not when the heads of the respective vessels are lying in different directions. *The London Packet*, 2 W. Rob. 213. It was held in *The Ann & Mary*, 2 W. Rob. 189, that in doubtful circumstances, where there is a probability of a collision, a vessel on the port tack, although close-hauled, is bound to give way to a vessel on the starboard tack, notwithstanding the latter may have the wind free. See also *The Commerce*, 3 W. Rob. 287; *The George*, 5 Notes of Cases, 368. In *The Lady Anne*, 1 Eng. L. & Eq. 670, the vessel on the starboard tack was held to be in fault for not luffing and easing off her head sheets. The collision was on a dark night; the vessel on the port tack ported her helm, while the one on the starboard tack kept on. Dr. *Lushington* said: "No doubt there are certain rules as to what they ought to do under particular circumstances; but the first and primary rule is to avoid a collision, and the loss of property and life, if it can be effected with safety."

<sup>4</sup> In *The Gazelle*, 2 W. Rob. 518, Dr. *Lushington* said: "The case we are now considering is the case of a steam vessel meeting a sailing vessel on a wind; and in such a case it is an undoubted proposition, that the steamer is bound to give way, whether the sailing vessel be upon the starboard or the larboard tack. What then is the meaning of the term giving way? I have already stated my own impression, that it means getting out of the way by any measure that the occasion

rule for their observance when meeting other steamers, or sailing vessels going large. When steam vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be a risk of coming into collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other. A steam vessel passing another in a narrow channel, must always leave the vessel she is passing on the larboard hand."

RULE OF 1851.

In 1851, it was provided by 14 & 15 Vict. c. 79, § 27, as follows :—

Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve

may require; and I am not aware of any expression that has ever fallen from any of the gentlemen by whom I have so often been assisted in these cases, that it means putting the helm to port under all circumstances." In *The Rose*, 2 W. Rob. 1, 5, it was contended that the rule did not apply, as the sailing vessel when first seen from the steamer was one point on her starboard bow. Dr. *Lushington* said: "It appears to me that . . . we never can, with any hope of a satisfactory result, enter into the discussion of the precise point in which one vessel lies to another at the time of being discovered. In my humble judgment, the safe course is to hold that the rule applies on all occasions where there is a probable risk of two vessels coming into collision." The *Trinity Masters* said: "The expression 'giving way' means not crossing a vessel's bows, but going under her stern." In *General Steam Nav. Co. v. Tonkin*, 4 Moore, P. C. 314, it was said that the rule can only apply "where the vessels by continuing their respective courses, are likely to come into collision, and where by putting their helm to port the collision may probably be avoided." This rule does not, however, always apply if the steamer has a vessel in tow. Whether it applies or not depends upon the state of the wind and weather, the direction in which the steamer is towing, and the nature of the impediments she may meet with in her course. The *Kingston-By-Sea*, 3 W. Rob. 154. In *The Arthur Gordon*, Lush. Adm. 270, a three-masted schooner came into collision in the daytime with a steamer which had a large vessel in tow. The tide was running to the westward; the wind was west, blowing a moderate breeze. The schooner was heading about N. N. W., and was close-hauled on the port tack. The steamer was heading about W. N. W., and was on the lee beam of the schooner. The schooner held her reach to the last. The steamer held her course until a collision was inevitable, when she starboarded her helm. Dr. *Lushington* held the steamer solely in fault. The Privy Council held both vessels in fault, the schooner for keeping her course without attempting to avoid the collision, and the steamer for not starboarding sooner, and for



any risk of a collision,<sup>1</sup> he shall put the helm of his vessel to port,<sup>2</sup> so as to pass on the port side of the other vessel, due regard being had to the tide, and to the position of each vessel with respect to the dangers of the channel, and, as regards sailing vessels, to the keeping of each vessel under command; and the master of any steam vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel;<sup>3</sup> and if the master or other person having charge of any steam vessel neglect to observe these regulations or either of them, he shall for every such offence be liable to a penalty not exceeding fifty pounds.

#### RULE OF 1854.

The Merchants' Shipping Act of 1854, c. 104, § 296, contained the following provisions: "Whenever any ship, whether a steam or a sailing ship, proceeding in one direction, meets<sup>4</sup> another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they

having an incompetent person in charge of the deck. The Merchants' Shipping Act was held not to apply.

<sup>1</sup> In *The Sylph*, 2 Spinks, Adm. 75, 82, Dr. *Lushington* said: "This chance of collision is not to be scanned by a point or two. We have held, over and over again, that if there be a reasonable chance of collision, it is quite sufficient. It is so difficult to ascertain whether a vessel is coming right on, or bears two or three points on the starboard or the larboard bow, that we have always held, if there be a reasonable chance of collision, the Act of Parliament applies; but we have never got to this, — and I hope we never shall, — that it applies when two vessels are sailing properly, and there is no chance of collision. I should observe that the words of the Act of Parliament apply to two vessels meeting each other, but not crossing each other."

<sup>2</sup> *Mackay v. Roberts*, 9 Moore, P. C. 357; *The Swanland*, 2 Spinks, Adm. 107.

<sup>3</sup> See *The Sylph*, 2 Spinks, Adm. 75.

<sup>4</sup> In *The Inflexible*, Swabey, Adm. 32, 35, Dr. *Lushington* said, in addressing the Trinity Masters: "It also applies to one ship proceeding in one direction and meeting another. I pray you to bear that in mind, that it does not apply to vessels crossing each other." The rule applies although the vessels are lying to, if they are approaching each other. *The James*, in Privy Council, Swabey, Adm. 60. In *The Arthur Gordon*, in P. C., Lush. Adm. 270, a schooner heading about N. N. W. and a steamer with a vessel in tow heading about W. N. W. came into collision. The wind was west. The statute was held not to apply. The court said: "The statute applies only to a case when vessels meet in opposite directions, end on, or nearly so, when the observance of the rule would make the vessels diverge so as to pass port side to port side."

would pass so near as to involve any risk of a collision,<sup>1</sup> the helms of both ships shall be put to port so as to pass on the port side of each other;<sup>2</sup> and this rule shall be obeyed by all steamships, and by all sailing ships whether on the port or starboard tack, and whether close-hauled<sup>3</sup> or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger,<sup>4</sup> and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command.<sup>5</sup> Section 297 of the same act provides that,

<sup>1</sup> In *The Ericsson*, Swabey, Adm. 38, a vessel on the port tack with the wind free, at night, saw the green light of a steamer broad on her starboard bow, and kept her course until the collision was inevitable. Dr. *Lushington*, after citing the statute, said: "But so long as the green light is seen broad on the starboard bow there is no danger of collision. It never was intended that when a vessel sees another at the distance of two miles, that she is to begin to change her course because there is a possibility of a collision. The intention of the statute is, that when two vessels are approaching each other and are within such a distance that there is strong probability of collision if both keep their courses, in that case both vessels are to port." In *The Cleopatra*, Swabey, Adm. 185, a steamer saw the green and bright lights of another steamer three points on the starboard bow, distant three or four miles, and thereupon starboarded her helm. Held, that she should have ported her helm. Dr. *Lushington* said: "According to my view of the statute, the meaning is this, — whenever two vessels are seen from each other, even in parallel courses, provided they are close to each other, or in any course so that there is reasonable probability of collision, it is their duty, unless there be some impediment, to obey the provision of the statute."

<sup>2</sup> *Lawson v. Carr*, 10 Moore, P. C. 162; *The Joseph Somes*, Swabey, Adm. 185.

<sup>3</sup> In *Chadwick v. City of Dublin Steam Packet Co.* 6 Ellis & B. 771, 38 Eng. L. & Eq. 107, the court held that the vessel might be close-hauled although she was not so near the wind as that she might not be nearer, without being thrown up into the wind, and that if she could not go any nearer without the command over her being lost, she was not obliged to port her helm.

<sup>4</sup> Dr. *Lushington*, in *The Cleopatra*, Swabey, Adm. 137, said: "That case does sometimes arise when two vessels are very close to each other, and it is impossible to comply with the provisions without danger being incurred, — that is a clear exception."

<sup>5</sup> In *The Inflexible*, Swabey, Adm. 32, 36, Dr. *Lushington* said: "Before the passing of this statute, it was a sort of established doctrine that a vessel being close-hauled on the starboard tack was to keep her course, and never to put her helm to port at all. Now the statute says, that you shall port your helm; you shall not be excused on account of being on the starboard tack, but it does not say that you shall throw yourself into stays, — that you are to lose command of

"every steamship, when navigating any narrow channel,<sup>1</sup> shall whenever it is safe and practicable,<sup>2</sup> keep to that side of the fairway or mid-channel which lies on the starboard side of such steamships."<sup>3</sup>

These sections were repealed in 1862,<sup>4</sup> and others substituted, which were adopted by an order in council now in force.<sup>5</sup> These rules are substantially the same as those now in force in this country.

In this country the rules of the maritime law prevailed until the first of January, 1858, when the following rules went into force for steamers navigating seas, gulfs, lakes, bays, or rivers, except rivers emptying into the Gulf of Mexico, and their tributaries.<sup>6</sup>

your vessel." In *The Halcyon*, Lush. Adm. 100, the vessel on the starboard tack was kept as close as she could be to the wind to keep her well under command. Held, that she was bound to do no more. See also *The City of Carlisle*, Brow. & L. Adm. 363, and p. 587, note 3.

<sup>1</sup> The channel or water between the bell beacon and the buoys of the Queen's Channel, leading to the port of Liverpool, is not a narrow channel within this act. *The Mœander*, Brow. & L. Adm. 29.

<sup>2</sup> In *The Unity*, Swabey, Adm. 103, Dr. *Lushington* said: "Whenever it is safe and practicable, — what is the meaning of these words? I apprehend it to be, where there is no local impediment of any kind, no difficulty arising from the peculiar formation of the channel itself, no storm, no wind, or anything of that kind occurring; then the obligation continues to keep to the starboard side, and no consideration of convenience, no opportunity of accelerating the speed, none whatever, can justify a disobedience to this statute." It was held in this case that a custom to navigate the river Tyne in a different way from that pointed out in the statute, was invalid. See also *The Hand of Providence*, Swabey, Adm. 107; *The Seine*, id. 411.

<sup>3</sup> *The Argo*, Swabey, Adm. 462. This rule applies to vessels in tow. *The La Plata*, in Privy Council, Swabey, Adm. 298, overruling s. c., Swabey, Adm. 221. The convenience of the steamship, or that of the custom-house officers in the discharge of their duty, will not justify a departure from the rule. *The Tyenoord*, Swabey, Adm. 374; *The Seine*, id. 411.

<sup>4</sup> 25 & 26 Vict. c. 63.

<sup>5</sup> Lush. Adm. App. lxxv.

<sup>6</sup> These rules were made by the board of supervising inspectors, October 17, 1857, and went into force January 1, 1858. They were made in pursuance of authority given by the act of 1852, c. 106, 10 U. S. Stats. at Large, 72. They are still in force so far as they are not inconsistent with the act of 1864. See Act of 1865, c. 234, 14 U. S. Stats. at Large, 227; Act of 1867, c. 83, 14 U. S. Stats. at Large, 411.

## RULES AND REGULATIONS FOR THE GOVERNMENT OF PILOTS.

ALL pilots of steamers navigating seas, gulfs, lakes, bays or rivers (except rivers emptying into the Gulf of Mexico, and their tributaries), when meeting or approaching each other, whether by day or by night, and as soon as within sight and fully within sound of the steam-whistle, shall observe and comply with the following

*Regulations.*

RULE 1. When steamers meet "head and head," it shall be the duty of each to pass to the right or on the larboard side of the other. And either pilot, upon determining to pursue this course, shall give as a signal of his intention *one* short and distinct blast of his steam-whistle, which the other shall answer promptly by a similar blast of the whistle.<sup>1</sup> But if the course of each steamer is so far on the starboard of the other as not to be considered by the rules as meeting "head and head," or if the vessels are approaching in such a manner, that passing to the right (as above directed) is deemed unsafe, or contrary to rule, by the pilot of either vessel, the pilot so deciding shall immediately give *two* short and distinct blasts of his steam-whistle, which the other pilot shall answer promptly by *two* similar blasts of his whistle, and they shall pass to the left, or on the starboard side of each other. NOTE. — *In the night*, steamers will be considered meeting "head and head" so long as both the colored lights of each are in view of the other. *In the day*, a similar position will also be considered "head and head."

RULE 2. When steamers are approaching each other in an oblique direction (as shown in diagram of fifth situation),<sup>2</sup> they will pass to the right, as if meeting "head and head," and the signal by whistle shall be given and answered promptly, as in that case specified.

RULE 3. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given or answered

<sup>1</sup> This does not apply to the case of a steamer meeting a sailing vessel. The Western Metropolis, U. S. D. C. New York, 1867, *Shipman*, J.

<sup>2</sup> See *ante*, p. 560.

erroneously, or from other cause, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way, until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

RULE 4. When steamers are running in a fog, or thick weather, it shall be the duty of the pilot to cause a *long* blast of the steam-whistle to be sounded at intervals not exceeding two minutes. And no steamer shall, in any case, be justified in coming into collision with another vessel if it be possible to avoid it.

RULE 5. Whenever a steamer is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer, when he shall have arrived within half a mile of such curve or bend, shall give a signal by *one* long blast of the steam-whistle, which signal shall be answered by a similar blast given by the pilot of any approaching steamer that may be within hearing. Should such signal be so answered by a steamer upon the further side of such bend, then the usual signals for meeting and passing shall immediately be given and answered. But if the *first* alarm signal of such pilot be not answered, he is to consider the channel clear, and govern himself accordingly.

RULE 6. The signals by blowing of the steam-whistle shall be given and answered by pilots in compliance with these rules, not only when meeting "head and head," or nearly so, but at all times, when passing or meeting, at a distance within half a mile of each other, and whether passing to the starboard or larboard.

N. B. The foregoing rules are to be complied with in all cases, except when steamers are navigating in a crowded channel or in the vicinity of wharves, — under these circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary to guard against collision or other accidents.

The rules of 1864 are as follows :—

TWO SAILING SHIPS MEETING.

*Article 11. If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.*<sup>1</sup>

TWO SAILING SHIPS CROSSING.

*Article 12. When two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled, and the other*

<sup>1</sup> In *The Delaware*, Holt, 64, a brig heading E. S. E. saw the green light of a bark one and a half to two points off on her port bow, and did nothing until the bark just before the collision changed her course and opened her red light, when she put her helm down. She stated the wind to be N. E. The bark claimed the wind to be N.  $\frac{1}{4}$  E; that she was heading W. N. W., when she saw the starboard light of the brig about a mile off and one point on her starboard bow, and that she thereupon ported her helm. The judge considered that the vessels were meeting nearly end on, but concurred with the elder brethren in holding the bark to be in fault. In *The Eliza*, Holt, 67, Dr. *Lushington* said: "That article applies to all sailing ships that are meeting, whether they are close-hauled or not close-hauled, and it is imperative upon all ships so meeting to put their helms to port, in obedience to this rule." In *The Catherina Maria*, Holt, 87, Dr. *Lushington* intimated that generally a vessel was not bound to port, if by doing so she should throw herself out of command. And in *The Wolverine*, Holt, 91, the same learned judge said: "Assuming that the case comes within the 11th article, the Trinity Masters think that the Norge being on the starboard tack, close-hauled, was not, under the circumstances, bound to have ported,—not venturing to lay down a universal rule, or to say that there may not be many cases under that article when vessels ought to port and throw themselves out of command, but considering that this is not a case in which the proper operation of that rule required the Norge to have ported. We hold her, therefore, not to blame in that respect, and we are of opinion she never starboarded as charged. We think the Wolverine did not take in time those measures which she ought to have taken in order to avoid this collision, and we must hold her solely to blame." In *The A. Denike*, U. S. C. C., Mass., 1868, *Clifford*, J., found the facts to be that the wind was W. N. W., one vessel, a schooner, was heading N. by W., and the other, a brig, S. by W.  $\frac{1}{4}$  W. Held, that they were not meeting end on or nearly end on. See also *The Victoria*, Holt, 70; *The Henry*, Holt, 72; *The Artemas*, Holt, 75; *The Lady Normanby*, Holt, 79, 14 *Law Times*, n. s. 895; *The Braga*, Holt, 83, 14 *Law Times*, n. s. 258; *The Catherina Maria*, Holt, 87.

*ship free, in which case the latter ship shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.*<sup>1</sup>

#### TWO SHIPS UNDER STEAM MEETING.

*Article 13. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.*<sup>2</sup>

#### TWO SHIPS UNDER STEAM CROSSING.

*Article 14. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.*<sup>3</sup>

#### SAILING SHIP AND SHIP UNDER STEAM.

*Article 15. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.*<sup>4</sup>

<sup>1</sup> In the *Spring*, Law Rep. 1 Adm. 99, the *Constantine* was heading N. N. E., the *Spring* W. by S. The wind was S. S. E. The C. kept her course. The S. ported. Both were held in fault, — the C. for having kept her course, and the S. for not having done so under the 18th article. See *The Smalea*, Holt, 40; *The Eliza*, Holt, 67; *The Henry*, Holt, 72; *The Lady Normanby*, Holt, 79, 14 Law Times, N. S. 895; *The John & Eliza*, Holt, 92; *The Constitution*, Holt, 96, Brow. & L. Adm. 324, 2 Moore, P. C. N. S. 453, 10 Law Times, N. S. 894; *The Orinoco*, Holt, 98; *The Presto*, Holt, 103; *The Maria*, Holt, 105; *The Tyrian*, Holt, 109; *The Flora*, Holt, 114; *The Zenobia*, Holt, 112; *The Calypso*, Holt, 117; *The Hannah Mary*, Holt, 119; *The Carlisle*, Holt, 121; *The Hebe*, 4 Moore, P. C. N. S. 271, Holt, 124; *The Cleaver*, Holt, 234; *The A. Denike*, U. S. C. C. Mass., 1868, *Clifford*, J.; *The Agra*, 4 Moore, P. C. N. S. 435.

<sup>2</sup> See *The Concordia*, Law Rep. 1 Adm. 93; *The City of Paris*, Holt, 21; *The Mexican*, Holt, 130; *The Cognac*, Holt, 133; *The Osprey*, Holt, 137; *The Stork*, Holt, 151; *The Graaf Van Rechteren*, Holt, 247. In *The Fingal*, Holt, 158, 12 Law Times, N. S. 611, Dr. *Lushington* said: "Part of the evidence says they were within two points of meeting end on. I should consider that if they were within two points of meeting end on, they would fall within the latter part of the statement — nearly end on."

<sup>3</sup> *The Chesapeake*, 1 Bened. Adm. 23; *The Favorita*, id. 30; *The Fingal*, Holt, 158; *The William Hunter*, Holt, 161.

<sup>4</sup> *The Zephyr*, Holt, 26; *The Zenobia*, Holt, 112; *The Topaze*, Holt, 165;

We have seen that, previous to this statute, a steamer was obliged in England to go to the right of a sailing vessel with the wind free, whereas in this country the privilege of going to the right or left was given to the steamer, while the sailing vessel was obliged to keep her course. In a late case in England the Privy Council held, under the new rules, that the steamer may go either to the right or the left.<sup>1</sup>

#### SHIPS UNDER STEAM TO SLACKEN SPEED.

*Article 16. Every steamship when approaching another ship so as to involve risk of collision,<sup>2</sup> shall slacken her speed, or, if necessary, stop and reverse;<sup>3</sup> and every steamship shall, when in a fog, go at a moderate speed.<sup>4</sup>*

These provisions are merely in affirmance of the rules of the maritime law which we have already considered.

The *Great Eastern*, *Brow. & L. Adm.* 287, *Holt*, 167; The *Lotus*, *Holt*, 181; The *John MacIntyre*, *Holt*, 184; The *Neptune*, *Holt*, 186; The *Supply*, *Holt*, 189; The *Castilian*, *Holt*, 190; The *Fanny Buck*, *Holt*, 193; The *Iron Duke*, *Holt*, 227; The *Emma*, *Holt*, 252; The *Aura*, *Holt*, 255. In *The Monticello*, *U. S. D. C. Mass.*, 1867, *Lowell, J.*, the lookout of a steamer saw the red light of a sailing vessel close to him, a little on his starboard bow. The steamer was going about eight knots an hour, and there was a calm at the time. The steamer ported. Held, that she should have put her helm to starboard. *Lowell, J.* said: "The experts on both sides agree that the order should have been to starboard. It is said to be a general rule of navigation that when the vessel which is bound to give way sees a light close at hand on the port bow, or directly ahead, the helm should be put to port, but if on the starboard bow, the helm should be put to starboard. Whether this be a general rule or not, it is manifestly a true rule for a case like this, where a red light of a sailing vessel is seen in a calm by a steamer going at least eight knots, because to clear her bows the steamer will require but a slight change, comparatively; one point, say the experts, would have cleared the schooner on that side, while it required three points on the other, the speed of the schooner counting for very little under the circumstances."

<sup>1</sup> *The Velasquez*, 4 *Moore*, *P. C. n. s.* 426. See also *The Aura*, *Holt*, 255; *The Mœander*, *Holt*, 243.

<sup>2</sup> *The Favorita*, 1 *Bened. Adm.* 30; *The City of Paris*, *Holt*, 21; *The Lady of the Lake*, *Holt*, 37.

<sup>3</sup> *The Karla*, *Holt*, 200; *The Bolderaa*, *Holt*, 205.

<sup>4</sup> *The Great Eastern*, *Holt*, 180, *Brow. & L. Adm.* 287, 3 *Moore*, *P. C. n. s.* 31; *The Fanny Buck*, *Holt*, 193; *The Lady of the Lake*, *Holt*, 202.



## VESSELS OVERTAKING OTHER VESSELS.

*Article 17. Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel.<sup>1</sup>*

This also is in accordance with what we consider was the rule established by the maritime law.

## CONSTRUCTION OF ARTICLES 12, 14, 15, AND 17.

*Article 18. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following article :<sup>2</sup>*

## PROVISO TO SAVE SPECIAL CASES.

*Article 19. In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger.<sup>3</sup>*

<sup>1</sup> The *Lena*, Holt, 61 ; The *Emma*, Holt, 207 ; The *Intrepide*, Holt, 210 ; The *Lena*, Holt, 213 ; The *Emily*, Holt, 217 ; The *Royal Consort*, Holt, 220 ; The *Evangeline*, Holt, 222 ; The *Union*, Holt, 225.

<sup>2</sup> See The *Spring*, Law Rep. 1 Adm. 99, cited under the 12th article ; The *Zephyr*, Holt, 26 ; The *Smales*, Holt, 40 ; The *Orinoco*, Holt, 98 ; The *Presto*, Holt, 103 ; The *Maria*, Holt, 105 ; The *Great Eastern*, Holt, 167, 3 Moore, P. C. N. S. 31, Brow. & L. Adm. 167, 287 ; The *Lotus*, Holt, 181 ; The *Neptune*, Holt, 186 ; The *Castilian*, Holt, 190 ; The *Fanny Buck*, Holt, 193 ; The *Cleaver*, Holt, 234 ; The *David Cannon*, Holt, 235 ; The *Thomas Lea*, Holt, 240 ; The *Mæander*, Holt, 243 ; The *Emma*, Holt, 252 ; The *Aura*, Holt, 255 ; The *Agra*, 4 Moore, P. C. N. S. 435. In The *John MacIntyre*, Holt, 184, where it was alleged that a sailing vessel, close-hauled on the port tack, starboarded, Dr. *Lushington* said : " If you should be of opinion that the sailing ship starboarded at a period when it might have produced an adequate result, and if, under those circumstances, it contributed in any degree to occasion the collision, then, whatever you may think of the conduct of the steamer, beyond all doubt you must hold the sailing ship to blame, for she abandoned the instructions given her by statute." In giving the decision the same learned judge said : " We are clearly of opinion that it is not proved that the sailing vessel starboarded so as to effect the collision. We think it possible that the sailing vessel, at the last moment, starboarded, and that the starboarding might have made a little difference as to where exactly the vessel was struck, but that is the utmost extent we can say, and we do not think she was to blame for what she did."

<sup>3</sup> See The *Spring*, Law Rep. 1 Adm. 99 ; The *Orinoco*, Holt, 98 ; The *Flora*, Holt, 114 ; The *Great Eastern*, Holt, 167, Brow. & L. Adm. 287 ; The *Graaf*

The burden of proving the necessity of a departure from the rules is on the vessel making such departure.<sup>1</sup>

NO SHIP UNDER ANY CIRCUMSTANCES TO NEGLECT PROPER PRECAUTIONS.

*Article 20. Nothing in these rules shall exonerate any ship, or the owner or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout,<sup>2</sup> or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.<sup>3</sup>*

### SECTION III.

#### EFFECT OF A BREACH OF STATUTORY PROVISIONS.

If a vessel disregards the provisions of a statute, the burden is on her to show in case of a collision that the accident was not owing to such neglect;<sup>4</sup> but if it is shown that the breach

Van Rechteren, Holt, 247; The Emma, Holt, 254; The Aura, Holt, 257. In The Agra, 4 Moore, P. C. N. S. 435, the court said: "Now their Lordships are clearly of opinion that if a ship, bound to keep her course under the 18th rule, justifies her departure from that rule under the words of the 19th rule, she takes upon herself the obligation of showing both that her departure was, at the time it took place, necessary in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger." In The Mexican, Holt, 130, Dr. Lushington said: "It would of course be sufficient excuse for the vessel proceeded against not to have ported her helm, if she was in so narrow a part of the river that by porting she would have run herself aground."

<sup>1</sup> The Concordia, Law Rep. 1 Adm. 93, Holt, 142. See also The Chesapeake, 1 Bened. Adm. 23.

<sup>2</sup> The Alma, Holt, 259.

<sup>3</sup> See The Perseverance, Holt, 262. In The A. Denike, U. S. C. C. Mass. 1868, the pilot of a schooner, when notified by the lookout that there was a light ahead, went forward and looked at it for several minutes and then went aft, saying the approaching vessel, a brig, was going all right. The brig was then a short distance ahead, and would have passed to leeward if she had kept her course. After the pilot went aft, the brig ported her helm and crossed the schooner's course. Held, that both vessels were in fault, the brig for porting, and the schooner because the pilot did not remain in the bow until the danger was passed.

<sup>4</sup> Waring v. Clark, 5 How. 465; The Hattie Ross, U. S. D. C. Conn., Shipman, J., 1866; Bulloch v. Steamboat Lamar, U. S. C. C. Georgia, 8 Law Rep. 275; Foster v. Sch. Miranda, 1 Newb. Adm. 227, 6 McLean, C. C. 221. See The Bay State, 3 Blatchf. C. C. 48.

of the statutory provision did not in any degree contribute to the collision, the violation of the statute will have no effect.<sup>1</sup>

The Merchants' Shipping Act of 1854<sup>2</sup> expressly provided that, "the owner of the ship," by which certain rules should be infringed, should not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision. The effect of this rule was to prevent the owner of such a vessel from recovering, although the other ship was also in fault.<sup>3</sup> Thus if A neglected to have the proper lights, and B neglected to keep a good lookout, and the collision was caused by the fault of both vessels, A could recover nothing, while B, although guilty of the violation of a rule of the sea, could recover one half his damages.<sup>4</sup> The injustice of this rule soon led to its repeal, and by the law of England now in force, if the damage arises from the non-observance of any statutory regulation, the vessel infringing is merely "deemed in fault,"<sup>5</sup> unless it is shown to the satisfaction of the court, that the circumstances of the case made a departure from the regulation necessary."

<sup>1</sup> *The Santa Claus*, Olcott, Adm. 428, under U. S. Stat. 1838; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420, under a statute of Connecticut; *Griswold v. Sharpe*, 2 Calif. 17, under a port regulation requiring the jib-booms of vessels to be run in. The 14 & 15 Vict. c. 79, § 28, provides that, "if any such collision is occasioned by the non-observance" of the rules, the owner of the vessel infringing cannot recover. In *Mackay v. Roberts*, 9 Moore, P. C. 368, the court said: "The true construction of this is, that if the rule has been violated or omitted to be obeyed, and yet such violation of the rule does not occasion the collision, it is the same as if it had not been violated at all." See also *The Panther*, 1 Spinks, 81, 24 Eng. L. & Eq. 585; *Morrison v. Gen. Steam Nav. Co.* 8 Exch. 733, 20 Eng. L. & Eq. 455; *The Aliwal*, 1 Spinks, 96; *The Trident*, id. 223; *The Telegraph*, 427; *The Emma*, Holt, 207. So, under the English Admiralty regulations of 1858, *The Livingstone*, Swabey, Adm. 519; *The James*, id. 62; *The Vivid*, id. 88. In *The Golden Pledge*, Holt, 136, Dr. *Lushington* said: "Whether the lamps of the Cognac were properly placed, or those of the Golden Pledge, I care not, for it was a perfectly fine night, and each vessel saw the other, according to their own witnesses, from three to four miles off."

<sup>2</sup> 17 & 18 Vict. c. 104, § 298.

<sup>3</sup> *Lawson v. Carr*, 10 Moore, P. C. 162. This section applies only to the owner of the ship, and does not prevent the owner of the cargo on board the ship infringing the statute from recovering half damages, if the other ship is also in fault. *The Milan*, Lush. Adm. 388.

<sup>4</sup> *The Aurora*, Lush. Adm. 327.

<sup>5</sup> 25 & 26 Vict. c. 63, § 29. See *The Lady of the Lake*, Holt, 38; *The Smales*, Holt, 40; *The Tuscar*, Holt, 44; *The Palestine*, Holt, 52; *The Lloyds*, Holt, 55.

The United States Act of 1849,<sup>1</sup> provides that "if loss or damage shall occur, the owner or owners of the vessel . . . neglecting to comply with these regulations, shall be liable to the injured party for all loss or damage resulting from such neglect; and the owner or owners of any vessel failing to comply with said regulations, shall forfeit a penalty of one hundred dollars." This has been held not to prevent the owner of the vessel failing to comply with the regulations of the statute, from recovering half damages if the other vessel is also in fault.<sup>2</sup> The United States act of 1864, contains no provision declaratory of the effect of a breach of the regulations therein prescribed. In a recent case it was claimed that as the vessel of the libellants did not carry lights, no recovery could be had, although the other vessel might be in fault; but this view was not sustained by the court.<sup>3</sup>

The same principle applies to the case of a vessel, which, at the time of the collision, is acting in violation of other laws than those we have just been considering, and the rule seems to be that she may recover damages if such violation in no way contributed to the collision.<sup>4</sup>

<sup>1</sup> Act of 1849, c. 105, § 5, 9 U. S. Stats. at Large, 382.

<sup>2</sup> *Chamberlain v. Ward*, 21 How. 548.

<sup>3</sup> *Kelly v. Thompson*, U. S. D. C. Mass., 1867, *Lowell, J.*, after stating the objection, said: "The law requires reasonable care and skill of all persons navigating the sea. The statute only defines in some particulars what measures of precaution are to be observed, and these are no more or otherwise obligatory than others which are established by the unwritten law, those, for instance, which declare that competent persons shall be employed on the lookout and at the wheel, and the like. If a collision happens, the question always is, by whose fault, and if negligence is proved, did it cause or contribute to the collision."

<sup>4</sup> In *The Steamboat Metropolis*, U. S. D. C. South. Dist. of N. Y. 1861, this question came before Judge *Shipman*. The suit was brought by the owner of a steam-propeller to recover damages arising from a collision on Long Island Sound. The 2d section of ch. 191 of the acts of 1838, 5 U. S. Stats. at Large, 304, provides that it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam to transport any goods . . . or passengers in or upon the bays . . . or other navigable waters of the United States . . . without having first obtained from the proper officer a license under the existing laws." The act imposes a penalty of \$500 for every violation of its provisions. It was conceded that the license referred to was the coasting license provided for by the act of 1793. The act of 1852, c. 106, 10 U. S. Stats. at Large, 61, was also referred to. At the time of the collision it was claimed that the libellant's vessel had no license, and that she could not recover.

The following cases were relied upon : *The Maverick*, 1 Sprague, 23 ; *The Leopard*, Daveis, 193 ; *Bosworth v. Swansey*, 10 Met. 363. After referring to these cases the learned judge said : " But on principle I do not think the doctrine now contended for can be sustained. There is no logical or legal connection between the failure of the *Harris* (the libellant's vessel) to take out a coasting license, and the collision which resulted in her destruction. She was not absolutely prohibited from being on Long Island Sound or in the vicinity of the accident ; nor is it necessary for her to justify her presence there by showing a license of any kind, although it might have been unlawful for her to have been engaged in the business covered by a coasting license. In the case of *The Maverick*, it must be remembered that, according to the facts there shown, the warp of the brig was rightfully in the place where it was struck, as against all but ferry-boats ; and in order to maintain the right to move forcibly against it, any vessel would have been required to justify under a ferry grant, and thus show a right superior to that of the brig. There was no right in common there. The warp or the steamboat must give way, and the latter could only claim the exclusive right by a justification under a special grant. That justification failed. But in the case of the *Harris* and *Metropolis*, neither claimed any exclusive right to navigate Long Island Sound in the exercise of which it became necessary for one to yield to the other. It was in the attempted exercise of no such right that the collision occurred. When Congress enacted a law requiring steamers to take out a coasting license, and have a proper certificate of equipment before carrying passengers, with heavy penalties, surely it was not intended that the penalty of outlawry should be superadded. This would vastly enhance the dangers of steamboat travel, which it was the object of the statute to diminish, and invite collisions, by exempting the colliding boat and its officers from the consequences of their carelessness or rashness. It would have been equally unlawful for the *Harris* to have had on board gunpowder or other explosive substances, without a special license for that purpose, as provided by the 7th section of the act of 1852 ; and while a violation of that provision would have subjected her to a penalty, I apprehend that such an omission to comply with the law would not be urged as a ground upon which she should be deemed an outlaw on the waters, and her right to any redress for any injuries arising from the negligence of others wholly denied." Speaking of the case of *Bosworth v. Swansey*, where it was decided that a person travelling on the highway on Sunday could not recover for damages caused by a defect in the highway, the learned judge said : " The application of the doctrine of that case to cases of collision would be a novelty in maritime law." Judgment was given for the libellants. The case was affirmed on appeal, by consent, in the circuit court, and an appeal was taken to the supreme court, but before the case was reached a compromise was effected. See also *Philadelphia R. v. Philadelphia Steam Towboat Co.* 23 How. 209.

## CHAPTER XII.

## ON WHARVES AND DOCKS.

IN the preceding chapter we have considered collision as it occurs between water-borne vessels, under canvas or steam. But it not unfrequently happens that vessels are injured, or cause injury, by striking upon wharves, or coming into contact with incumbrances in the docks beside or between the wharves. Such cases give rise to questions concerning the rights, duties, and liabilities of the vessels or their owners on the one hand; and of the owners of the wharves or docks on the other.

The most general of these questions, the answer to which must enter into the consideration of most of the others, is, What is the relation of the owner of a vessel that makes fast to a wharf, to the owner of the wharf? If one, without license, invitation, or business, chooses to enter into a house and walking through it receives injury from some defect in the house, he certainly has no claim upon the owner, who has the right to leave his house in what condition he will, or to destroy it if he chooses. But if one has obtained leave or license to enter the house, so that he is no longer a trespasser, is the owner now answerable to him for the unsafe condition of the house? Again, we should say that he was not answerable to a mere licensee, who, on his own business or for his own pleasure, visited the house. But if the person injured had come to the house, not on the mere license, but on the express or implied invitation of the owner, some liability on the part of the owner might now begin. Invitation is more than mere permission; and it would seem to include, or to imply, the duty of having the premises in such condition that they might be visited with safety.

But let us go further. If one keeps a store, and has therein a counter, and in front of it an open space, easily accessible from the street, and in which customers may stand while they make their purchases or otherwise attend to their business which brought them there, we should say that another and much stronger duty and liability rests upon the owner. He has, for his own benefit,

invited everybody to come there when he will, in the common hours of business. And if the floor is weak, or openings are left unguarded, and a visitor on business is injured by reason of these defects, or by any other unfitness of the premises for the purposes to which it is dedicated, the owner would be liable. That he would be responsible for such injuries if caused by defects attributable to his negligence, we cannot doubt, and are not sure that he would not be held to some kind or measure of warranty that the premises were safe; for if they had become unsafe without his fault, or opportunity to repair, he could close his doors, or at the least give notice of the danger.<sup>1</sup>

<sup>1</sup> *Chapman v. Rothwell*, 1 Ellis, B. & E. 168. In this case the plaintiff declared that defendant was in occupation of a brewery, office, and passage leading thereto from the public street, used by him in his business of a brewer, which passage was the ordinary way to and from the office; that the defendant wrongfully and negligently permitted a trap-door in the passage to remain open without being properly guarded and lighted; and that the plaintiff's wife, who was lawfully passing along the passage as a customer, fell through the aperture and was killed. Held, that defendant was liable. *Erle, J.*, said: "The distinction is between the case of a visitor who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendants."

In *Freer v. Cameron*, 4 Rich. S. Car. 228, a clerk invited a customer into a dark part of the store, where, without any negligence on her part, she fell through an open trap-door and fractured her arm. In an action for damages, the jury found for plaintiffs. On motion for a new trial by the defendants, the court said: "There is something in the very fact that the place of disaster was a store, with the usual invitation to every customer to enter, with every attraction to look upwards and not downwards. Now who would ever dream that in such a place, in any part of it where articles were exhibited for examination and sale, an open pit was to be found, such as Mrs. Freer encountered? She would have had even more cause to apprehend that an overhanging chandelier might be so carelessly adjusted as to fall upon her in the middle of the room. . . . It is next insisted that the defendants violated no law or right in another in maintaining a cistern in a retired part of their store; and if injury, purely accidental, resulted from such legitimate exercise of the rights of property, there is no ground for redress. Let this be admitted. But what is our case? It is not the cause of action that the defendants kept a cistern in one or other part of their store. The complaint is, that the entrance to the cellar (or cistern, if that was the structure) was left open, from the darkness of the day, and place not readily discoverable, and that the complaining party fell in, and was thereby damned, while visiting a portion of the store in conformity to the clerk's invitation. Surely these facts point to culpable carelessness on the part of the defendants only. While our law encourages the full exercise of dominion over property by the proprietor, it inculcates, in the same breath, the

These questions have recently been much considered, and we speak of them here, because the principles involved seem to us

injunction, so use your own that you hurt not another." The motion for new trial was refused.

*Southcote v. Stanley*, 1 H. & N. 247. In this case, the defendant was a keeper of a hotel, into which he had invited the plaintiff to come as a *visitor*, and while opening a glass door for the purpose of leaving the hotel, the plaintiff was badly injured by a large piece of glass falling upon him from the door. A distinction was made by the court between a customer and a visitor. *Pollock*, C. B., said: "The position, that an action lies because the plaintiff was lawfully in the house, cannot be supported. A servant is lawfully in his master's house, and yet if the balusters fell, whereby he was injured, he could not maintain an action against the master. If a lady, who is invited to dinner, goes in an expensive dress, and a servant spills something over her dress which spoils it, the master of the house would not be liable. Where a person enters a house by invitation the same rule prevails as in the case of a servant. A visitor would have no right of action for being put in a damp bed, or near a broken pane, whereby he caught cold. . . . The mere relation of master and servant does not create any implied duty on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. . . . The reason for the rule is, that the servant undertakes to run all the ordinary risk of service, including those arising from the negligence of his fellow-servants. The rule applies to all the members of a domestic establishment, so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow-servant; neither can one servant maintain an action against another for negligence whilst engaged in their common employment. The same principle applies to the case of a visitor at a house; whilst he remains there, he is in the same position as any other member of the establishment, so far as regards the negligence of the master or his servants, and he must take his chance with the rest." *Alderson*, B., said: "The case of a shop is different, because a shop is open to the public; and there is a distinction between persons who come on business and those who come by invitation." Judgment was given for defendant.

In the case of *Elliott v. Pray*, 10 Gray, 378, it was held where the defendants owned a building and occupied the lower story of it, but leased the upper part to a tenant with permission to use a certain entrance, between which and the stairs leading to the rooms above there was a trap-door, that they would be liable for injuries sustained by a person lawfully passing there. *Bigelow*, C. J., in giving the opinion of the court, said: "The defendants would be bound to use the trap-door there situated with reference to the fact that others had a right to pass and repass through the entry in going to and from the upper rooms of the building; and if the defendants were guilty of negligence, either by omitting to stop all passing through the entry while the trap-door was open and they were hoisting goods; or by failing to take any suitable and reasonable precautions to guard against accident, they would be liable to a person having lawful occasion to pass to or from the upper rooms, who, while in the use of due care, sustained



precisely those which should be applied to the questions raised by a vessel's coming to a wharf; concerning which we do not find much direct authority.

If a vessel comes to a public wharf, in the course of its business, with no reason to doubt that it will there find usual facilities and means, and pay for them the usual price, we should say that this vessel was not a mere licensee, nor a visitor; but a customer, coming for purposes of business, to a place of business. Where the wharf is a private wharf, we should say that the owner would not be liable for an injury sustained by a vessel which should come to the wharf without his assent or the assent of his agents, but that he would be liable in the same way as the owner of a public wharf, if the vessel should come to the wharf with his assent under an agreement express or implied to pay wharfage.<sup>1</sup>

It would follow that the vessel should find the wharf, and the dock by its side, safe; or, in other words, that she should encounter nothing in the condition of the wharf, or of the dock, which should expose her to unusual danger.<sup>2</sup>

injury by reason of their negligence." It was also further held, that "The warehouse of the defendants being upon a public street in the city, and being used by persons who had lawful occasion to pass from the street to the upper parts of the building, if the doorway and entry where the injury to the plaintiff happened were so constructed as to appear to afford a proper place for gaining access to the chambers, and they were left open by the defendants in such manner as to be held out to persons having occasion to go into the chambers, as a suitable place of entrance thereto, who were thereby induced to enter, the defendants would be liable to any person, lawfully passing there under or by reason of such inducement, who was injured in consequence of the carelessness of the servants of the defendants in leaving the trap-door open, whereby such person, using due care, fell and sustained personal injuries." See also *Corby v. Hill*, 4 C. B. N. S. 556; *Sweeney v. Old Colony R.* 10 Allen, 368; *Indermaur v. Dames*, Law Rep. 2 C. P. 311.

<sup>1</sup> See *Wendell v. Baxter*, 12 Gray, 494.

<sup>2</sup> *Pittsburgh v. Grier*, 22 Penn. State, 54. This was an action to recover damages for injuries sustained by the sinking of a steamboat at a public wharf in the city of Pittsburgh, in consequence, as was alleged by the plaintiffs, of the negligence of the defendant, in allowing a quantity of iron to lie for an unreasonable time upon the landing. The opinion of the court was delivered by *Black, C. J.* who said: "The city being in possession of the wharf, exercising an exclusive supervision over it, and receiving tolls for its use, is it a violation of the duty which the corporate authorities owe to the public to let it get out of repair? . . . The general rule undoubtedly is, that those who have a public work under their control are bound to repair it, and the force of this obligation is still further increased

We should not say that there was any warranty on the part of the owner of the wharf, or of the wharfinger, of a kind to make

when it yields its possessors a revenue. The cases above cited (3 B. & Ad. 77; 11 Wend. 543; 21 Wend. 115) show that this principle applies to public ports in the possession of a city, as well as canals, bridges, and other highways in the hands of individuals and private corporations. There is no reason nor authority for any distinction. The interests of commerce imperatively require that the place to which vessels are invited to come should be in a safe condition. Nobody but the city of Pittsburgh can possibly keep her port in order, for she alone has it in charge, and permits no one else to meddle with it; and it is justice that she should take the burden, because she receives the only direct profit which it yields. . . . It is a mistake to suppose that the right of action is based on the city ordinances, or that the wrong committed consists in a neglect to enforce them: the injury is a violation of the duty which arises out of the control which the city has over the port, and her receipt of tolls from the vessels which come into it. It is no matter whether that duty remains unperformed because she has no ordinances on the subject, or because, having ordinances, she neglects to enforce them; the responsibilities of the corporation are the same in either case. . . . The negligence of the city authorities made it necessary for the vessel to back out into the stream in order to avoid immediate destruction. If she had not done so, the defence would doubtless have been set up that she was mismanaged by those who had charge of her. To prevent her from settling down on the iron as the water sunk, by which she must inevitably have been broken in two, she was shoved out and exposed to another danger, not then apparent, but in its results equally disastrous. . . . The defendants were bound to furnish the plaintiffs with a secure port. They ought to have performed that duty with vigilant fidelity; but it was done in such a manner that they might as well have received the fee and then refused the boat a landing altogether. They are held to a responsibility at least as strict as if they had been insurers of the vessel against all dangers from which a well-regulated port in good condition would have saved her. Who can doubt that she was wrecked simply because she had not a good landing-place? . . . It is argued that the destruction of the boat was a consequence which the agents of the city could not have foreseen as likely to occur, and, because they did not expect it, they are not answerable for it. But it is not the law, that men are responsible for their negligence only to the extent of the injuries which they knew would result from it. If it were, there would be no recoveries except for malicious wrongs. This injury was produced by the iron upon the wharf. The question in the cause was, whether the loss should fall on the city, whose duty it was to remove the nuisance, and who had the right and power to do it, or on the owners of the boat, who were under no such obligation. Every principle of law and justice requires that it should be borne by the former and not by the latter party.

"It is insisted that the plaintiffs might have seen the danger as well as the defendants, and that one party was as much bound to avoid it as the other was to remove the cause. It is true that where a person brings an injury on himself by his own inexcusable default, he cannot recover compensation for it from another,

them liable without fault. Nor that they should be held to the utmost possible care, and therefore be held liable for any injury, which any care could have prevented.} But that they are bound to take *due* care; and this means that they should take all such care as reasonable men would take to guard themselves or their property from injury.<sup>1</sup>

whose negligence concurred with his own in producing it. But the rule is inapplicable to this case; for even if we assume that both parties had equal opportunities of seeing and understanding the danger, they were not bound to equal degrees of vigilance. The city was held to the utmost care of the wharf; the owners of the boat only to that common prudence which would keep them clear of a manifest peril." The judgment of the court below was affirmed, in favor of the plaintiffs. See also *Parnaby v. Lancaster Canal Co.* 11 A. & E. 223; *Mersey Docks v. Penhallow*, 7 H. & N. 329; *Gibbs v. Trustees of Liverpool Docks*, 3 H. & N. 164; *Mersey Docks Co. v. Gibbs*, 11 H. L. Cas. 686, Law Rep. 1 H. L. 93.

<sup>1</sup> *Wendell v. Baxter*, 12 Gray, 494. Here it appeared that the owners of a wharf which was private property, had let a part of it to the Cape Cod Steamboat Company for the use of their steamboat, which was employed in bringing the mail to Nantucket, and that while the plaintiff, who was employed by the company to carry in his wagon the mail-bags between the steamboat and post-office, was backing his horse upon that part of the wharf used by the company, the horse was injured by reason of a defect in the wharf.

The jury were instructed by *Bishop, J.*, "that if they were satisfied that the defendants had established the wharf for the use of the public, and invited the public to use it for reasonable compensation, they were bound to keep the wharf safe for the uses for which it was made and erected at that place; that if the plaintiff, being properly on the wharf in the prosecution of his business, and in the exercise of reasonable care and diligence, sustained the injury alleged through a defect in the wharf, he was entitled to recover, unless the defect was latent, and so hidden and concealed that it could not be discovered by such examination and inspection as the construction, uses, and exposures of the wharf reasonably required; that if the defendants knew that causes rendering the wharf insecure were constantly or occasionally in operation, which they could by the exercise of ordinary diligence and care anticipate and provide against, they were required to do so." A verdict was returned for the plaintiff, and the defendants alleged exceptions. *Metcalf, J.*, in overruling the exceptions, said: "The court are of opinion that there is no legal ground of exception to the instructions which were given to the jury. . . . Access over the wharf to the boat, and from the boat over the wharf, for the purpose of lading and unlading the boat, was the undoubted right of all persons who had occasion for such access. . . . The defendants were legally bound to exercise (at least) ordinary diligence to keep their wharf safe for those who had a right to pass over it; as an innkeeper is bound to keep the access to his inn, and the passages and apartments in it, safe for those who may wish to enter, or who have entered it legally. It has been argued for the defendants, that if they were legally bound to keep their wharf in repair, they were so bound

It would be impossible to enumerate all the particulars as to which this care should be taken. The wharf must kept in good repair, and its strength maintained. It must not be unduly encumbered; and if it be encumbered at night, it should be lighted. A suitable wharfinger should be employed, with such assistants as might be necessary for the proper discharge of his duty by day and by night. If the dock were encumbered by mud, coal or gravel, or by timber, or masses of metal or rock, these should be removed as soon as it could be done by reasonable exertions. And, in the mean time, full and adequate notice should be given of the danger, and the way to avoid it. In the absence of such notice or direction, a vessel coming to a wharf has a right to go to what part of the wharf it will.<sup>1</sup> And if any part is dangerous, such distinct and precise notice how to avoid that danger should be given to an approaching vessel, that, if it persists in encountering the danger, it is the fault of the vessel.

In a case which has recently been tried in the United States Court for the District of Massachusetts, many of the questions considered in this section arose; and, in addition, one concerning the Sunday law. The vessel was hauled to the wharf where the damage was sustained, on Sunday; and it was claimed that this was in violation of the statute of Massachusetts. It was con-

only in favor of those with whom they, as owners, contracted or dealt, and that they had no contract with the plaintiff. But the plaintiff's right of action arises from the duty which the law imposed on the defendants to keep their wharf safe, so long as they should permit it to be open and used, and not from any contract between them and him. *Collett v. London R.* 16 P. B. 984, 989. It has also been argued, that the instructions did not accurately limit the defendants' liability; that the jury were first instructed that the defendants were bound to keep the wharf safe for the uses for which it was made; although it might have been impossible to keep it safe, because the action of the sea might, in one night, have rendered it unsafe, without their knowledge or their power seasonably to apply a remedy. But that instruction was general, and was not intended to state the extent or the limits of the defendants' obligation. Certainly it cannot be understood to mean that the defendants were bound at all events to keep the wharf continually in repair, and that they would be liable for any injury received through want of its safety, however and whenever such want should be caused. And the last part of the instructions limited the defendants' duty and obligation, in this case, to the exercise of ordinary diligence, and also limited their liability to the want of ordinary diligence. Of this limitation the defendants, surely, have no cause to complain."

<sup>1</sup> *Pittsburgh v. Grier*, 22 Penn. State, 54.

tended, however, on the other hand, that this statute was not intended to apply to the navigation of vessels, and that the maritime law makes no distinction between Sunday and other days of the week. It was also contended that if the State law applied, the effect of its violation was only to impose a penalty, and that the owners could still recover for the wrongful act of the defendants. In the Southern District of New York, in 1861,<sup>1</sup> where *Bosworth v. Swansey*, 10 Met. 363, was cited, wherein it was held that a person travelling on the highway on Sunday cannot recover for a defect in the highway, *Shipman, J.*, said: "The application of the doctrine of that case to cases of collision, would be a novelty in maritime law." Similar views were expressed by the Supreme Court of the United States, in a case before them;<sup>2</sup> and it is mainly on the authority of this case, that *Lowell, J.*, rested, in the case above referred to.<sup>3</sup> There are obvious and strong reasons

<sup>1</sup> The Steamboat Metropolis, cited *ante*, p. 597.

<sup>2</sup> Philadelphia R. v. Philadelphia Steam Towboat Co. 23 How. 209. See also Powhatan Steamboat Co. v. Appomattox R. 24 How. 247.

<sup>3</sup> *Sawyer v. Oakman*, U. S. D. C. Mass. February, 1867. In this case the libellants were the owners of the schooner "Bowdoin," and the respondents owned a wharf and dock at Charlestown. The schooner, loaded with a full cargo of coal, arrived in port consigned to the respondents, and at the request of the latter made fast at one of the piers of the wharf, and awaited for some days the discharge of two other vessels which had had a prior right to the berth. On Saturday the master attempted to haul into the dock, which was then clear, but failed, and did haul in at high tide in the afternoon of Sunday. On Monday morning it was discovered that the vessel was badly hogged and strained, causing a damage estimated in the libel at ten thousand dollars. The libellants attributed the damage to the bad state of the dock, which they said had a large pile of coal in it and was otherwise dangerous. The respondents averred that the injury resulted from the negligence of the master in not hauling to the place pointed out to him for that purpose, and in not putting in suitable fenders. The dock has two berths, of which the upper or inner berth is much shallower than the other, and is intended for vessels that take the ground at low tide, and the theory of the defence was, that the vessel lay partly in one and partly in the other, and so did not rest wholly upon the ground at low tide; and she had a considerable list outwards or to port, which is alleged to have been caused by the master's negligence, and the damage was attributed by the respondents to one or both of these causes. They further set up as matter of law, that the master in removing his vessel on Sunday was acting illegally, under the statutes of Massachusetts, and could not recover for any injuries received in or in consequence of doing such an act.

In giving his decision, *Lowell, J.*, said: "Upon these much contested points I

for supposing that the Sunday law was not intended to apply to the navigation of vessels; and we are aware of no case in which it has been so applied. It could not be intended to prohibit the sailing, arrival, or moving of vessels on Sunday; and if it did,

am of opinion, upon the preponderance of the evidence, that the damage was probably caused by the vessel's resting on the pile of coal, though this point is by no means clear. But if not, yet that the master complied substantially with the directions of the wharfinger in placing his vessel as he did, and that he put in the usual fenders. He was not warned of any danger, nor that there was any reason for his hauling to any particular spot, except the convenience of discharging his vessel at that berth, which was the real and only object of that notice, nor of the necessity for larger fenders, and in hauling as he did to a place within reach of the landing stage and suitable for discharging, and in fending in the usual way, he exercised due care and skill; for I agree that without special notice he would not be bound to more than usual care, either in placing his schooner or in making fast.

"It is clear that if the vessel was properly navigated and made fast, the injury must have resulted from some defect in the respondents' dock, and this is hardly denied. Now whether the defect were of the kind supposed by the one side or by the other, appears to me immaterial, because in either case the respondents must be presumed to have known of it, since the pile of coal had been there for some days, and the inequalities in the bottom of the dock for some years. And upon principles recognized alike at common law and in the admiralty, the owners of the dock and wharf making use of it for gain in the course of their business, would be liable for the damage arising from such defects, to a person lawfully using the dock in the course of business and in the exercise of due care. *Philadelphia R. Co. v. Philadelphia Steamboat Co.* 23 How. 209; *Parnaby v. Lancaster Canal Co.* 11 A. & E. 223; *Mersey Docks Co. v. Gibbs*, Law Rep. 1 H. L. 93. It remains to inquire whether the libellants are in a condition to recover this damage. They hauled in on a Sunday, not at the end of a voyage, but in order to be in a position to save a tide on Monday.

"It can hardly be denied that the act of hauling in on the Lord's day was an illegal act, under the statute of Massachusetts cited at the bar, which prohibits the performance of work and labor on that day, excepting in case of necessity. And cases were cited from the Massachusetts reports more or less analogous to this, and especially the important and leading case of *Gregg v. Wyman*, 4 Cush. 322, which tend to show that a plaintiff who is obliged as part of his case to found himself upon such an act cannot recover damages of a defendant who is likewise in the wrong. But without examining the authorities, or the reasons on which they rest, with critical attention, and assuming that no action analogous to this could be maintained in the courts of Massachusetts, I yet feel constrained, whatever my judgment might be upon the question, if new, to follow the decision in 23 How. 209. That was a case very similar in its circumstances to this, and a statute of Maryland almost identical with ours was relied on, but the Supreme Court sustained the action."

every pilot who brought a vessel in or out on Sunday, and every sailor who helped in the navigation of a ship, would be guilty of a breach of law, and could not be excused by the fact that he acted in obedience to orders. Maritime law seems nowhere to make a distinction between Sunday and other days. We know of no instance in any book or treatise on the jurisdiction of admiralty in which such a distinction is intimated, and no case in which a court of admiralty is asked to declare a capture illegal, or refuse to give damages for collision, or compensation for salvage, or wages to a sailor, on the ground that the facts on which these several claims rested took place on Sunday.

## CHAPTER XIII.

## ON PASSENGERS.

## SECTION I.

## COMMON CARRIERS AND PRIVATE CARRIERS.

ALL the books which treat of the law of carriers acknowledge the important distinction between a common carrier and a private carrier. Very different rights, duties, obligations and responsibilities attach to these two classes of carriers. We have already considered this distinction in reference to the carriers of goods; and have remarked upon the uncertainty which still rests upon the principles or the definitions which would determine between a ship that is a common carrier, and one that is only a private carrier. Language is used in some cases which would seem to indicate that every vessel, whether under canvas or steam, is a common carrier. This cannot be true, for there must be such a thing as a vessel that carries either goods or passengers for hire, under circumstances which would make her only a private carrier, by special contract. If the principles which generally define the distinction between these classes of carriers on land be applied to those on water, it would seem that no vessels are common carriers that do not ply between definite termini, having their regular routes from one place to the other, like packets, or liners, as they are sometimes called.

These principles have, however, been somewhat relaxed as to carriers on land; so far, for example, as to consider hackmen and others, who go wherever they are required to, common carriers. And the decisions in respect to carriers by water would go still further. As we have seen, this distinction is comparatively unimportant as to water carriers of goods, from the universal use of bills of lading,<sup>1</sup> which are express contracts between the ship-owner

<sup>1</sup> See *ante*, p. 250.



and the shipper of goods, and determine their rights and obligations. But passengers are not carried under bills of lading. And so far as they are concerned, we should be disposed to give the character of common carriers only to vessels which might fairly be considered as packets or liners. And we shall presently see that where passengers are carried by other vessels, it is usually under express contracts ; the construction and effect of which we shall consider in another section.

A question has arisen in England whether any vessels can be considered as common carriers of passengers, where they sail from a place within the realm to one that is without the realm. If the law of common carriers be extended so far as to cover cases of vessels going from one port in a country to another port in the same country, which seems to be certain, a different case is presented when the vessel sails for a foreign country. In the English case above referred to, the vessel was a steam packet, plying between Southampton in England, and Gibraltar in Spain. The general objection was taken, that the law of common carriers was confined to the land ; and then the more particular objection, that if it extended to carriers by water, it must be confined to those which went from port to port "within the realm." But the ruling of the court was with the plaintiff on both points.<sup>1</sup>

<sup>1</sup> In *Benett v. The Peninsular Steamboat Co.*, 6 C. B., 775, the declaration stated that on, &c., the defendants were possessed of a certain steam vessel called the *Montrose*, then lying at Southampton, and about to sail to Gibraltar in Spain for the purpose of carrying passengers ; that the defendants were then common carriers for hire of passengers in and by the said steam vessel from S. to G. ; that the plaintiff was then desirous of becoming a passenger in and on board of the said steam vessel, and then at a reasonable and proper time in that behalf tendered himself to the defendants at Southampton aforesaid to be carried by them as aforesaid, and then requested the defendants to receive him as such passenger ; that the plaintiff was then ready and willing to pay the defendants all reasonable passage-money, hire and reward for being carried by them as such passenger, — of which the defendants then had notice ; and that, although the defendants then had sufficient room and accommodation on board said vessel to receive the plaintiff as such passenger, and to carry him in manner aforesaid, yet the defendants disregarded their duty in that behalf, and did not nor would receive the plaintiff as such passenger on board the said steam vessel to sail, as the same did then sail from S. to G. without the plaintiff, &c.

Third plea, that the defendants were not common carriers of passengers for hire, *modo et forma*, &c. The cause was tried before *Wilde*, C. J., at the sittings in

## SECTION II

## OF THE OBLIGATIONS OF CARRIERS BY WATER, AS TO PASSENGERS.

The first of these may be stated thus : Every common carrier of passengers by water, is bound to receive and carry all who offer,

London, Michaelmas term, 1847. It appeared that the defendants were the proprietors of certain steam vessels, one of which was advertised, by circulars issued by defendants, to sail every ten days from Southampton for Corunna, Vigo, Oporto, Lisbon, Cadiz and Gibraltar, — the circulars giving the times of starting and the terms upon which passengers were to be conveyed to those places respectively, and goods also if there was room for them ; that the plaintiff went to Southampton on the 27th of February, 1847, for the purpose of taking his passage by one of the defendants' vessels, called the *Montrose*, but that in consequence of some communication which had been made to the defendants by the Portuguese consul, their agent refused to allow him to take a passage, although it was admitted that there was plenty of room.

On the part of the defendants it was submitted that the third issue ought to be found for them, for that the common-law liability of carriers did not extend to carriers of *passengers* or to *extra-territorial* carriers ; and that the company's circulars imported a limited and not a general undertaking to carry passengers.

The lord chief-justice left it to the jury to say whether or not the evidence satisfied them that the defendants carried on a business of common carriers for hire.

The jury found in the affirmative, and a verdict was accordingly entered for plaintiff on that issue, with leave to the defendants to move to enter the verdict thereon for them if the court should be of opinion that this was not the fair legal inference from the evidence.

*Maule, J.*, said : " The allegation of duty is idle. The declaration states, not that the defendants were common carriers, according to the custom of England, or from one place to another within the realm, but that they were common carriers for hire from Southampton to Gibraltar in Spain. The third plea denies that the defendants were common carriers for hire as alleged in the declaration ; issue is taken upon that, and the jury have found they *were* such common carriers."

*Wilde, C. J.*, said : " It seems to me that there is no ground for setting aside the verdict. . . . The question is, Can a man be a 'common carrier' of passengers from a place that is within the realm to a place without it. Mr. Justice *Story*, in the very able treatise that has been referred to, defines a common carrier to be a person who does just what the defendants in this case are proved to have done. . . . I see no reason for holding that 'common carriers' must of necessity mean persons employed to carry within the realm and according to the custom. It seems to me that this declaration and the issue taken upon it by the third plea may be understood in a sense that will make the whole con-

unless special causes for refusal exists. That this is the law as to common carriers on land, is a familiar and well-established principle.<sup>1</sup> But this rule of law has been regarded as equally and unquestionably applicable to common carriers by water. It was so regarded in the English case just above cited; in an interesting American case by *Story, J.*,<sup>2</sup> and in a case in Michigan;<sup>3</sup> and

sistent, that the question was properly left to the jury and that the verdict was right."

*Coltman, J.*, said: "This declaration, when it calls the defendants 'common carriers,' does not mean to allege that they are carriers within the realm, and according to the custom of the realm, but that they are persons who were in the habit of conveying passengers for hire from England to certain places beyond the seas. . . . I think the question was correctly left to the jury."

*Maule, J.*, held the same. . . . "As soon as you establish the *termini*, the only question raised by the third plea is whether the defendants actually did those things which *Dr. Story* defines as the duties of a common carrier. It was suggested by the attorney-general that the liabilities of common carriers of goods differ from those incurred by common carriers of passengers. But whatever the law may be, I think the allegation here can only mean that the defendants were common carriers of passengers in the sense in which *Dr. Story* speaks of common carriers of goods. Common carriers would not cease to be common carriers although their common-law liabilities should be abrogated by act of parliament. I think the question was properly left to the jury, and properly found by them."

*V. Williams, J.* "I am entirely of the same opinion." Rule discharged.

<sup>1</sup> Angell on Carriers, 4th edit. §§ 524 - 531, 590, 612. 3 Parsons on Contracts, 225, *et seq.*

<sup>2</sup> *Jencks v. Coleman*, 2 Sumner, 221.

<sup>3</sup> *Day v. Owen*, 5 Mich. 520. The action was case against defendant as a common carrier. The first count in the declaration alleged that the defendant was the owner of the steamer *Arrow*, plying between Detroit and Toledo, and that the plaintiff applied on board of said steamboat for a cabin passage from Detroit to Toledo, and offered to pay for the same, which was averred to be a usual mode of conveyance of passengers upon said boat; that although there was room, the defendant refused to give the plaintiff a cabin passage, whereby the plaintiff was put to great expense, trouble, and delay, and obliged to travel in the night a hundred miles out of his way to reach Toledo. A second count alleged that the defendant was a common carrier by water, of passengers in and by the cabin and deck of said steamboat, for the conveyance of travellers in said cabin or upon said deck, as such travellers might desire, for reasonable hire and reward, which was greater in case conveyance was required in the cabin than in case it was required upon the deck; that the defendant was proprietor of said cabin, said deck, and all parts of said vessel; that plaintiff went on board said boat and demanded to be carried in said cabin to Toledo; but although he tendered the greater hire and reward, and the vessel was ready to start, and said cabin was not full of passengers, and there was no ground for refusal, yet defendant refused to carry

seems to be implied in many of the cases we shall cite to other points.

plaintiff, &c., causing plaintiff great loss, expense, and mortification. A third count alleged a refusal to carry generally, stating that the defendant set up no ground of refusal except that the plaintiff was a colored man.

This count contained no averment that plaintiff offered or was ready and willing to pay the fare.

The defendant pleaded general issue, and appended thereto three notices of special matter to be shown at the trial.

1. That plaintiff was a colored man and not a white man; and that by the custom of navigation, and the usage prevailing among steamboats employed in carrying passengers on Detroit River and Lake Erie, colored persons were not allowed the privileges of cabin passengers.

2. That by regulation and established course of business of the said boat, colored persons were not received as cabin passengers, and were not allowed to use the cabin, and said regulation, &c., was averred to be reasonable.

3. That the plaintiff by his color and his race was excluded from the ordinary social and familiar intercourse with white persons, by the custom of the country and that his admission into the cabin of said steamboat would have been offensive to the other cabin passengers.

General demurrer by plaintiff, which was overruled, and judgment for the defendant for costs rendered; and thereupon the plaintiff brought error.

*Manning, J.*, said: "This last count is bad, as it contains no averment that plaintiff offered or was ready and willing to pay the fare. The notice accompanying the general issue sets up three several grounds of defence to the declaration, and may therefore be considered as three separate notices. . . . The right to be carried is a right superior to the rules and regulations of the boat, and cannot be affected by them. If defendant had refused to carry the plaintiff generally, he would be liable, unless he could show some good excuse, releasing him from the obligation. While this is a right that cannot be touched by rules and regulations, the accommodation of passengers, while being transported, is subject to such rules and regulations as the carrier may think proper to make, provided they be reasonable. The right to be carried is one thing, — the privileges of a passenger on board the boat, what part of it may be occupied by him, or he have the right to use, is another thing. The two rights are very different. The latter and not the former right is subject to reasonable rules and regulations, and is, where such rules and regulations exist, to be determined by them. Hence the allegation . . . in the second count, as it relates to the accommodation of passengers while being transported, must be understood as a statement of a right that is subject to rules and regulations, where they exist. . . . The refusal to allow the plaintiff the privilege of the cabin on his tendering cabin fare, was nothing more or less than denying him certain accommodations, while being transported, from which he was excluded by the rules and regulations of the boat.

"All rules and regulations must be reasonable; and to be so should have for their object the accommodation of the passengers. Under this head we include

If the rule itself, or the general obligation, is thus transferred from the land to the water, so, we cannot doubt, would it be with the exceptions to the rule, or the excuses which justify a disregard of it. As, for example, the fact that the carrier's vehicle is so full that its accommodations are exhausted, and that it can carry no more without inconvenience, not only to the passenger applying, but to all on board. We cannot doubt that this rule, which rests on obvious and sufficient reason, would apply to common carriers of passengers by water. We go further, however. As it is a universal rule, that all carriers must provide for their passengers suit-

everything calculated to render the transportation most comfortable and least annoying to passengers generally, not to one or two, or any given number carried at a particular time; but to a large majority of the passengers ordinarily carried. Such rules and regulations should also be of a permanent nature and not to be made for a particular occasion or emergency. In pleading, it is sufficient to state the rule or regulation, that the plaintiff comes within it, and to aver its reasonableness. . . .

"But the reasonableness of a rule or regulation is a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the court. It may depend on a great variety of circumstances. . . . It is not to be inferred from the rule or regulation itself, but must be showed positively. . . . The reasonableness of the rule, if it be reasonable, does not depend upon the color of the plaintiff or on the class of persons to which he belongs, all of whom are alike excluded, but on the effect the carrying of such persons in the cabin would have, not on the defendant's business as a carrier, — although it might be to his advantage, — but on the accommodation of the mass of persons who have a right and are in the habit of travelling on his boat. As the duty to carry is imposed by law for the convenience of the community at large, and not of individuals except so far as they are a component part of the community, the law would defeat its own object if it required the carrier, for the accommodation of particular individuals, to incommode the community at large. He may do so if he chooses, but the law does not impose it upon him as a duty. . . . If he deems it for his interest to do so, looking to an increase of passengers from the superior accommodations he holds out to the public, to deny him the right would be an interference with a carrier's control over his own property in his own way, not necessary to the performance of his duty as a carrier.

"The second defence stated in the notice is, we think, a sufficient answer to the second count of the declaration. We also think it good as to the first count; which does not in terms make mention of the carrying of passengers on deck. It states defendant refused to carry the plaintiff in the cabin, and not that he refused to carry him generally, and seems to admit the carrying of passengers in other parts of the boat as well as in the cabin, and therefore does not make out a case of refusal to carry generally. . . . The judgment below must be affirmed with costs. *Martin, C. J., and Christiancy, J., concurred. Judgment affirmed.*

able accommodations, and subject them to no suffering or inconvenience which can be avoided by reasonable care or effort, we say that the common carrier of passengers by water has no right to carry an additional passenger, when his vessel is already so full that the addition of more must make all on board uncomfortable. The added passenger might have no right to complain, and certainly would not if he knew what annoyance he must encounter by going on board. But passengers who have gone on board while there was still room for them, and have occupied all that room, have a right to complain, if additions are made which so crowd the ship as to subject them to serious inconvenience. The law would not care "*de minimis*" here, more than elsewhere. But a passenger who could make out a case of sufficient magnitude, might, on this ground, sustain an action for damages.<sup>1</sup>

Another excuse for not permitting an applicant to become a passenger, is a well-founded belief that he seeks his passage that he may make use of it to the pecuniary detriment of the carriers, either by diminishing their business, or by making it less profitable. It may be said that a public carrier has no right to inquire into the motives of a passenger, or his reasons for coming on board. And this may be generally true. But if the carrier has established, at considerable expense, a business by which the public benefits, he would have a right to protect this against insidious attacks. If he had not expected the public to profit by the business he would not have established it, as he could not have expected it to be profitable. And if the public makes little or no use of it, it would fail and cease of itself. It is from considerations of this kind that the peculiarities of the law of common carriers have arisen. They have certain definite relations with the public; and on this ground, as well as the common right of self-defence, the law permits them to protect themselves against those who would make use of their means of conveyance to their detriment. But this is limited by its reason. They must be open to all fair competition, for this the public interest demands. And if they defended themselves against the charge of wantonly excluding a passenger, by asserting his intended interference with their arrangements or contracts, they must show that these were reasonable and proper in themselves. All this seems to be included in the decis-

<sup>1</sup> See *The Pacific*, 1 Blatchf. C. C. 569.

ion of a case which came before Mr. Justice Story, and has been already referred to.<sup>1</sup>

<sup>1</sup> *Jencks v. Coleman*, 2 Sumner, 221. The facts as they appeared at the trial were substantially as follow : That the plaintiff was the agent of the Tremont line of stages running between Providence and Boston ; that his object was to take passage in the boat to Newport, and then go on board the *President*, on her passage from New York to Providence, for the purpose of soliciting passengers for the Tremont line of stages to Boston. This the proprietor of these boats had prohibited, and had given notice that they would not permit agents of that line of stages to take passage in their boats for that purpose. The reason assigned for such prohibition was, that it was important for the proprietors of the steamboats that the passengers from their boats for Boston should find, at all times on their arrival at Providence, an immediate and expeditious passage to Boston. To insure this object the Citizens' Coach Company had contracted with said proprietors to carry all passengers who wished to go, in good carriages, at reasonable expedition and prices, and the commanders of the boats were to receive the fare and make out way-bills of the passengers, for the Citizens' Coach Company. This they continued to perform. The plaintiff's attempt was to counteract this effect in favor of the Tremont line. In this instance defendant refused to permit plaintiff to take passage in the boat for Newport, though he tendered the customary fare.

For the plaintiff it was contended that the boat proprietors were common carriers, and every person conducting himself with propriety had a right to be carried unless he had forfeited that right ; the plaintiff in this instance did conduct with propriety, and had not forfeited his right to be carried by any misconduct. The proprietors and coach company had attempted to establish a monopoly which should not be countenanced, it being against public interest. Such a monopoly operated to increase the price and prolong the time of passage from Providence to Boston, while open competition promoted the public interest and convenience, by reducing the fare and expediting the passage.

The plaintiff in this instance requested to be conveyed from Providence to Newport, during which passage it was well known no passengers were to be solicited, — that was to be done only on the passage from Newport to Providence.

For the *defendant* it was contended that the contract made by the steamboat proprietors and the Citizens' Company was legal, and subserved the public convenience and the interests of the proprietors of the boats and stages. It insured to the passengers expeditious passages at reasonable prices ; that the rule excluding such agents was just because it was necessary to promote the public convenience and the interests of the proprietors of both the boats and stages. Of this interdiction the plaintiff had received notice, and had no legal right to complain.

*Story, J.* "There is no doubt that this steamboat is a common carrier of passengers for hire ; and therefore the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question, then, resolves itself into the mere consideration whether there was,

So the general rule would apply to them, which permits a refusal of passage to one who would endanger the others by a conta-

in the present case, upon the facts, reasonable ground for the refusal? The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe for the due accommodation of passengers, and for the due arrangements of their business. The proprietors have not only this right, but the further right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. *They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct. . . .* Nor are they bound to admit passengers on board whose object is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them. While, therefore, I agree that steamboat proprietors holding themselves out as common carriers are bound to receive passengers on board under ordinary circumstances, I at the same time insist that they may refuse to receive them if there be a reasonable objection. And as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations, and may justly be refused a passage if he wilfully resists or violates them. . . . Jencks was at the time the known agent of the Tremont line of stage-coaches." He knew of the contract between the boat proprietors and another line of coaches. "Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on both routes, and might be material to the interests of the proprietors of those steamboats. . . . He had the fullest notice that the steamboat proprietors had forbidden any person to come on board for such purposes. . . . It has been said that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think the proprietors had a right to inquire into such intents and motives, and to act upon the reasonable presumptions which arose in regard to them. Suppose a known or suspected thief were to come on board, would they not have a right to refuse him a passage? Might they not act upon the presumption that his object was unlawful? Suppose a person were to come on board who was habitually drunk and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be. . . . The only real question then in the present case is, whether the conduct of the steamboat proprietors has been reasonable and *bona fide*. The true question is, whether the contract is reasonable and proper in itself, and entered into with good faith and not for the purpose of an oppressive monopoly. If the jury find the contract reasonable and proper, and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise for the plaintiff." Verdict for defendant.



gious disease, or annoy them by his drunkenness, or his disreputable appearance or manners.<sup>1</sup>

It would seem, however, that if a passenger who might have been refused passage from his bad reputation, character or habits, is received on board, he cannot afterwards be expelled, if while on board he is guilty of no impropriety; nor can he be treated with such insult or contumely as would compel him to leave the vessel.<sup>2</sup>

<sup>1</sup> See the remarks on this subject by *Shaw, C. J.*, in *Commonwealth v. Power*, 7 Met. 601.

<sup>2</sup> *Coppin v. Braithwaite*, Exch. 1844, 8 Jurist, 875. Declaration alleged that at the time of committing the grievances mentioned, the defendant owned a certain steamboat called the *Prince Albert*, which was on a certain day, &c., about to proceed with passengers on a certain excursion or voyage, &c., for a certain reasonable reward in that behalf then paid to the defendants by the plaintiff, to wit, the sum of 4s. The declaration then alleged that the defendants had notice of the premises, and then assented and agreed with the plaintiff to receive him on board, &c., as a passenger, &c., and then received from the plaintiff the price or reward aforesaid, and that it then became the duty of defendants to carry the plaintiff on board the said vessel, &c. It then averred that the defendants did not so carry plaintiff, but declined and refused to do so, and wholly refused to permit the plaintiff to proceed on said voyage; but on the contrary, and against and without the consent of the plaintiff, caused him to disembark at a place called Gravesend, without permitting the plaintiff to proceed on the voyage, and contrary to their duty in that behalf, and then *did cause the disembarkation of the plaintiff to be conducted in a scandalous, disgraceful, and improper manner, and also by contemptuous usage and insulting language addressed to, applied to, and imputed to the plaintiff by the agent of the defendant*, did attempt to defame and disgrace the plaintiff and bring him into public scandal, &c., whereby the plaintiff hath sustained damage to a large amount, &c., &c. At the trial it appeared that on the occasion in question the plaintiff, a tradesman resident in London, went with several friends on board the *Prince Albert* steamer, of which defendants were owners, and paid 4s. for an excursion passage to Sheerness. On returning up the river, as the vessel approached Gravesend, the captain said to the plaintiff and his friends: "You are well known; you sha'n't go with me to London; you belong to the swell mob, and are pickpockets. You must go on shore at Gravesend; and if you will not go by fair means, you must go by foul." Plaintiff and his friends then left the vessel, applied for admission on board another going to London, but were refused a passage as having been turned out of that belonging to the defendants. They then went up through the town, a large mob following them, and on ordering horses to go to London, were only supplied on condition of paying in advance. On this evidence, *Rolfe, B.*, told the jury that "the defendants were responsible for any injury naturally resulting from the acts of the captain when acting as their servant. Even supposing the plaintiff and his party had been pickpockets or belonged to the swell mob,

An important qualification of this rule has been applied to passengers on a railroad, the reason of which would apply equally to

that might be a reason for watching them, but, so long as they were not guilty of any impropriety on board, formed no justification for putting them ashore; and that the plaintiff was entitled to a fair compensation for the injury received, *so far as injury arose from the act of the captain in putting him on shore.*" The jury found for the plaintiff £ 50. On motion to set aside the verdict, *Parke, B.*, said: "This rule must be discharged. . . . The learned judge expressly excluded all evidence of damage not arising from the immediate acts of the captain as the agent of the defendants, and told the jury that they were to confine their attention exclusively to the damage resulting from those acts. Then with respect to what was said by the captain at the time of turning the plaintiff out of the vessel, I think it was properly received. There can be no doubt that the defendants are liable for everything done in breach of the contract by the captain acting as their servant. The breach alleged in the declaration is the refusing to carry the plaintiff in the ship, and turning him out of it in a contemptuous manner, before the termination of the voyage. The turning him out is part of the breach; the mode of turning him out is part of the evidence in the case. A contract is broken, and it is quite impossible to exclude from the view of the jury the circumstances under which it was broken. Surely it would make a most material difference if the contract were broken because it would be inconvenient to carry him to his journey's end, and if he were turned out under circumstances of aggravation." *Alderson, B.*, and *Gurney, B.*, concurred.

In *Pearson v. Duane*, 4 Wallace, 605, it appeared that in the month of June, 1856, the steamship *Stevens*, a common carrier of passengers, of which *Pearson* was master, on her regular voyage from Panama to San Francisco, arrived at the intermediate port of Acapulco, where *Duane* got on board intending to proceed to San Francisco. He had shortly before been banished from that city by a revolutionary yet powerful and organized body of men, called "The Vigilance Committee of San Francisco," upon penalty of death in case of return. This committee had just before, against his will, placed him on the *Golden Age*, a steamer in San Francisco harbor destined for Panama, with directions that he should be conveyed beyond the limits of California; and he was forcibly carried to the Mexican port of Acapulco. The presence of the *Stevens* afforded him a chance of return, and he was willing to encounter the risk of so doing. He went openly to the boat, at the public gangway, and talked freely with some of the officers and passengers. It is not certain that the master knew of his being on board until they were at sea, but no orders were given for his exclusion; and although he was without a ticket or money to buy one, yet a passenger offered to pay his fare, which the purser declined receiving.

There was no evidence that *Duane* would have been excluded, had the master been aware that he was on board before leaving Acapulco. The master, becoming aware of the position in which *Duane* stood as regards the vigilance committee, determined to send him back to Acapulco by the first ship he met.

The steamer *Sonora*, of the same line of steamers, came in sight, and was stopped.

passengers by water. It is said that the conductor may expel one who, by reason of intoxication or otherwise, is in such a condition

The master of the Sonora informed Pearson that he had orders not to carry back any banished person, and that Duane *would certainly be executed if he returned*, and advised that he should be sent to the Sonora. Duane was transferred to the Sonora, and landed at Acapulco. The transfer was effected without any indignity to Duane, who at first resisted, but was induced by friendly counsels to yield. Duane did not return to California till 1860. The vigilance committee no longer existed, and he then filed a libel for damages, setting forth the facts above stated; that having been expelled as he was from the Stevens, all efforts to get on board of other vessels to San Francisco were unavailing; that he went to Aspinwall, but the line of steamers on which he expected to go had just been discontinued; and that finally, through charity, he got to New York, where, without money or means, his character and reputation blasted, he was dependent on charity, and was for several months confined in a hospital, physically unable to attempt a voyage to California until 1860.

By the twelfth article of his libel, the libellant assigned, as a reason for delay in bringing his action, the state of things in San Francisco, and his own belief, that, if he returned, his life would be put in jeopardy, a belief which he alleged "existed to the time of his departure from New York to California."

The answer, besides a defence from lapse of time, asserted that the libellant was not "a good or law-abiding citizen of San Francisco," and that he had "secretly, and without any right to do so, got on board of the Stevens, and remained secreted on board as a stowaway," and that the defendant, in sending the libellant back on the Sonora, had been influenced by humane motives. The District Court decreed in favor of Duane, with \$4,000 damages; and the decree was affirmed in the Circuit Court. The case was then appealed to the Supreme Court.

Mr. Justice Davis delivered the opinion of the court. "This case is interesting because of certain novel views which this court is asked to sustain. Two questions arise in it: 1st. Was the conduct of Pearson justifiable? 2d. If not, what should be the proper measure of damages? It is contended, as the life of Duane was in imminent peril in case of his return to San Francisco, that Pearson was justified, in order to save it, in excluding him from his boat, notwithstanding Duane was willing to take his chances of being hanged by the vigilance committee. Such a motive is certainly commendable for its humanity, and goes very far to excuse the transaction, but does not justify it. . . . If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty should he be returned to a city where lawless violence was supreme. But this refusal should have preceded the sailing of the ship. After the ship had got to sea it was too late to take exceptions to the character of a passenger or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done, and the defence that Duane was a stowaway, and therefore subject to expul-

as to make it reasonably certain that he *will be* offensive or annoying to other passengers.<sup>1</sup>

sion at any time, is a mere pretence, for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the Sonora. Although a railroad or a steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him after having admitted him as a passenger and received his fare, unless he misbehaves during the journey. Duane conducted himself properly on the boat until his expulsion was determined, and when his fare was tendered to the purser, he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it. . . .

"Duane is entitled to compensation for the injury done him by being put on board the Sonora, so far as that injury arose from the act of Pearson in putting him there. But the outrages which he suffered at the hands of the vigilance committee, his forcible abduction from California and transportation to Acapulco, the difficulties experienced in getting to New York, and his inability to procure a passage from either Acapulco or Panama to San Francisco, cannot be compensated in this action. . . .

"If he believed, when expelled from the Stevens, that Pearson had done him a great wrong, he certainly did not when he filed the libel in this case. . . . On a review of the whole case, we are of opinion that the damages should be reduced to fifty dollars. It is further ordered that each party pay his own costs in this court."

<sup>1</sup> In *Vinton v. Middlesex R. Co.* 11 Allen, 304, it appeared that the plaintiff was a passenger in one of the defendant's cars, and was expelled by the conductor.

There was no evidence that any rule had ever been adopted by the defendants, authorizing their conductors to expel passengers for any cause. Defendants introduced evidence tending to show that at the time of the expulsion the plaintiff was intoxicated, and used loud, boisterous, profane and indecent language towards the conductor, and attempted to strike him, and that he was therefore expelled. But the evidence on this point was conflicting. There were four women in the car as passengers. The defendants requested the court to instruct the jury, among other things, as follows: "If the jury find that the plaintiff was in defendants' car in a state of intoxication, so as reasonably to induce the conductor to believe that the plaintiff would be an annoyance to the passengers, or if the plaintiff so conducted, or used boisterous, profane or indecent language, naturally calculated to annoy the passengers, and persisted in so doing after being requested to be quiet, the conductor would be justified in removing him, using no more violence than was necessary to effect his removal." The judge, declining so to rule, instructed the jury as follows: "If the plaintiff, by reason of intoxication or otherwise, was in act or language offensive or annoying to the passengers, the conductor had a right to remove him, using reasonable force. If the conductor, in the performance of his services as conductor, forcibly removed the plaintiff without justifiable cause, or if, having justifiable cause, he used unnecessary and unreason-

There have been cases in reference to passengers by land, asserting and illustrating the rule, that the carrier must carry his passengers the whole of the route undertaken, and therefore to the very terminus of the route.<sup>1</sup> Thus, if passengers usually alight from a certain stage-coach in the yard of an inn, they cannot be compelled to get out at the gate.<sup>2</sup>

The reasons for this rule would apply to passage by water ; but there would be important modifications from the fact that water conveyance must end with the shore. This has been fully considered in the chapter on carriage of goods.<sup>3</sup> Carriers by water, as well as those by land, have undoubtedly a right to make all reasonable regulations as to the admission of passengers, and, indeed, as to all the circumstances of the transit ; and may require conformity with them. So, too, they may now limit or qualify their liability for loss or injury by reasonable and suitable regulations ; and passengers, to whom a knowledge of them before buying their tickets was brought home, would be bound by such regulations. But the law would undoubtedly look with much more indulgence upon such regulations or limitations, if they applied only to the cases of baggage, than if they proposed to qualify the liability of

able violence in kind or degree, the defendants are liable." Verdict for plaintiff, damages \$1,000 ; and defendants alleged exceptions.

*Bigelow, C. J.*, after quoting the instructions given to the jury, said: " We are constrained to say that we know of no warrant, either in principle or authority, for putting any such limitation on the right and authority of the defendants as common carriers of passengers or of their servants acting within the scope of their employment. . . . They had a right in the exercise of this authority and duty to repress and prohibit all disorderly conduct in their vehicles, and to expel or exclude therefrom any person whose conduct or condition was such as to render acts of impropriety, rudeness, indecency, or disturbance, either inevitable or probable. Certainly the conductor in charge of the vehicle was not bound to wait until some overt act of violence, profaneness, or other misconduct, had been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender. The right and power of the defendants and their servants to prevent the occurrence of improper and disorderly conduct in a public vehicle, is quite as essential and important as the authority to stop a disturbance or repress acts of violence or breaches of decorum after they have been committed." See also *People v. Caryl*, 3 Parker, C. R. 326.

<sup>1</sup> See *Ker v. Mountain*, 1 Esp. 27 ; *Massiter v. Cooper*, 4 Esp. 260 ; *Porter v. Steamboat New England*, 17 Misso. 290 ; *Weed v. Saratoga R.* 19 Wend. 534.

<sup>2</sup> See *Dudley v. Smith*, 1 Camp. 167.

<sup>3</sup> See *ante*, p. 220 - 231.

the carrier for injuries to the person of a passenger by their fault, and without his fault.

They may make and publish all reasonable regulations for admission, and for the transit. But they are themselves bound by these regulations, and the public notices they give. Thus they are held, as by a contract, to the place of starting, the hour of starting, the course to be pursued, &c.; and this not merely by their public notices, but by their own established usage.<sup>1</sup>

<sup>1</sup> *Heirn v. McCaughan*, 32 Miss. 17. On the trial of the cause below, McCaughan and wife proved that Heirn, Grant, Geddes and Day were the proprietors of several steamboats engaged in carrying the mails and passengers and freight between New Orleans and Mobile, and the intermediate landings on the sea-coast. Among these was the Steamer Florida, commanded by captain Grant, one of the copartners. R. Geddes, another of the copartners, kept the office of the company in New Orleans; from that office were issued all the notices in reference to the running of the steamers: and one Abrams was the confidential clerk of the company, and employed in said office. The winter arrangement differed from the summer; during the former period the boats did not stop at Pascagoula ordinarily, the business at that point being done by one of the company's boats called the Creole. It was the practice of the company, when deemed advisable, to give special notice at Pascagoula and other landings, of the intended stopping of a boat at such points. In 1853 the following letter was issued from the office in New Orleans, transmitted by one of the company's boats, and delivered to the postmaster at Pascagoula on the 21st day of that month.

"OFFICE OF THE MAIL LINE AGENCY, NEW ORLEANS.

POSTMASTER, PASCAGOULA.

"DEAR SIR:—This is to advise you that the mail-boat hence for Mobile on Saturday next will stop at Pascagoula, instead of the steamer Creole. You will please have a mail in readiness for Mobile, to go by said boat, and oblige, &c.,

"R. GEDDES,

"By ABRAMS.

"N. B.—Advise all who may feel interested in the above."

The postmaster, upon its reception, posted it up on the door of a storehouse in Pascagoula, near the post-office, and by this means it was generally known over the place. McCaughan, who resided at Mississippi City, arrived in the neighborhood of Pascagoula on the 21st December, in his schooner, accompanied by his wife, and bound for Mobile, and they remained there until the 24th. Being informed of the notice, he sent his schooner home, and procured transportation for himself and wife to Pascagoula, intending to take defendants' boat that evening for Mobile. The plaintiffs waited for the boat, which was expected to arrive at night. They went to the pier head, where it was necessary to wait, and, amid great discomfort, waited till morning in vain. Mrs. Mc'C. was in delicate health, and Mr. Mc'C. suffered deprivation in order to make her comfortable. On the part of the defendant it was proven by the pilot of the Steamer Florida, en-

As their obligation is to carry their passengers through their whole route, so their responsibility ceases when the voyage terminates. Hence, where a contagious disease came on board a vessel, and the authorities of New Orleans, on her arrival there, sent the passengers to a hospital, it was held that the owners of the vessel were not liable to the city for the expense incurred thereby.<sup>1</sup>

The common carrier by water is always regarded as under a

gaged in running her on the night of the 24th of December, that owing to the low tide and the storm the steamer could not have stopped at Pascagoula without danger, and if she had there would have been failure to deliver the mail at Mobile in proper time. Two or three witnesses being employees of the defendant testified in substance the same. It was also proven on behalf of the defendant that it was usual and customary for the mail-line company to disregard special notices to stop at particular places, if in the judgment and opinion of the captain and pilot it was not advisable; that the running and management of the boats were under the charge of the captain and pilot.

On account of this failure of the boat, M'Caughan's arrival in Mobile was delayed three or four days; he was also put to the extra expense of \$ 30. No physical injuries were shown to have actually resulted to either M'C. or his wife as the result of their exposure.

*Handy, J.*, delivered the opinion of the court: "The duty which it is alleged the company failed to perform, was that imposed upon them as common carriers, and not one proceeding from a special contract to transport the plaintiffs from Pascagoula to Mobile. It was an obligation which the company owed as well to the public at large as to the plaintiffs, by reason of their general business as common carriers and transporters of passengers; and that obligation was not changed from a general duty to a matter of special contract by the fact that the company gave notice that they would stop at Pascagoula at a specified time in the course of the regular business in which they were engaged and in which the public were interested. . . . For each party had an equal right to performance of the obligation; and it was the misfortune or the fault of the company, if they undertook incompatible obligations, but no ground of immunity from either of them.

"If, therefore, it was the duty of the company to send their boat to Pascagoula at the time specified, as a carrier of passengers and freight, according to the course of their business, they had no right to disregard that obligation. We think, therefore, that there was no error in the instruction."

In *Cobb v. Howard*, 3 Blatchf. C. C. 524, it was held that where a contract was made to transport passengers from Panama to San Francisco, by a steamer which was to leave Panama on a certain day, that the owners of the vessel were bound to have her there on that day; and that it was no excuse that the vessel was disabled by stress of weather on her voyage to Panama, and could not arrive in time. See, for cases on this point, *Whitesell v. Crane*, 8 Watts & S. 369, and *Sears v. Eastern R.* 14 Allen; and cases *ante*, p. 182, n. 1.

<sup>1</sup> *New Orleans v. Ship Windemere*, 12 La. An. 84.

contract to supply his passengers with comfortable accommodations by day and by night, and sufficient and wholesome food.<sup>1</sup> In determining what these are, resort must be had to usage; and this indeed would be almost decisive. The law would make much allowance for the difficulties which belong to all transport by water. It is impossible to supply at once a want, discovered, it may be, at sea; or an expected inferiority in or deficiency of provision, when reasonable care had been taken. In a case turning very much on this point, it was held that the plaintiff must be "a sufferer; it is not because a man does not get so good a dinner as

In *Yates v. Duff*, 5 Car. & P. 369, there was an action to recover damages for the breach of a verbal agreement, by which defendant engaged two cabins on board of the ship *Sesostris* bound from England to Madras, for which he was to pay 350 guineas. He refused to go, because the vessel, which was to have left by the tenth of October, did not. It was proved that it was the rule of the East India trade, that when a passenger refused to go in consequence of delay in the sailing of the vessel, he was to forfeit half the amount of the passage-money. On October 3d, defendant wrote a note inquiring if the *Sesostris* would not sail from Portsmouth by the 15th instant, and received in reply from the broker the assurance that she would certainly "leave Blackwall on the tenth, and Portsmouth on the 15th of October, wind and weather permitting." On the 10th of October defendant wrote again to broker, expressing his surprise at hearing from him that the *Sesostris* would not leave until the 13th, and announcing his determination to declare off the bargain. The S. left the docks on the 21st of October, but being delayed at Portsmouth by contrary winds, did not sail from thence till the 9th of November.

*Tindal*, C. J., addressing the jury said: "There are two questions for your consideration in this case. The first is, Whether the time of sailing formed an essential part of the contract? For if it did, it has not been complied with. If, on the contrary, it was not a real and essential part, but only matter of representation while the matter was going on, then you will consider, secondly, whether, under the circumstances, the ship sailed *within a reasonable time*. In this case I should think much will not turn upon the second part, for if you assume that time was not an essential part, you would not say that a delay of about a week amounted to an unreasonable stoppage. The main question is, Was there any understanding at the time of the contract that the ship was to sail positively by the 10th and the 15th? Was the tenth of October understood by the parties to be of the essence of the contract? If you think time was not understood to be a part of the contract, then you will find for plaintiff, unless you think the delay was unreasonable; and if you find for the plaintiff, you will give half the passage-money, which it appears from the evidence he is entitled to under the circumstances." Verdict for plaintiff.

<sup>1</sup> The *Aberfoyle*, 1 Blatchf. C. C. 360.



he might have had, that he has, therefore, a right of action against the captain."<sup>1</sup>

It is seldom that any express contract, or any other than that involved in the sale and purchase of a ticket, is made by a passenger on board a packet or liner; and we have already expressed our opinion, that, on general principles, these vessels alone should be considered as common carriers. If, however, he makes any express contract when taking passage on board of such a vessel, it has of course full force in determining the relations of the parties, and their mutual rights and obligations; and these are left to the law of common carriers, when no such express contract exists. So, too, a passenger may offer and be received on board a vessel that is not a common carrier, and make no express contract. In such a case the parties would rest upon their implied contract. This would be, on the part of the ship, to carry the passenger; and on his part, to pay for his passage. But, for the rest, their duties and rights must depend on usage, if there were one, and as far as it went, and on the consideration of such duties and rights as, under the circumstances of the case, reason and justice would infer from this relation between the parties.

We believe, however, that the taking passage on board such a

<sup>1</sup> *Young v. Fewson*, 8 Car. & P. 55. One count of the declaration stated in substance, that, in consideration of the sum of £50, paid by plaintiff to defendant, as captain of the ship *Lima*, it was the defendant's duty to furnish him with good and fresh provisions, &c., on a voyage, &c., and averred that he did not do so. The plaintiff was a clerk to the parties who chartered the *Lima* for "a round sum," and he was sent out by them as supercargo. The money was paid by them and not by the plaintiff personally. There was a great deal of evidence as to the supply of the table by the captain during the voyage.

Lord *Denman*, C. J., in summing up, said: "It appears that the plaintiff did not pay the £50, but I think there is evidence that the money was paid for him as supercargo, and that it was the duty of the defendant to supply good and fresh provisions for him; and if he did not provide such supply, then the question will be, whether the plaintiff has been in any degree a sufferer by the captain's neglect. . . . I think the result of the whole is, that the captain did not supply so large a quantity of good and fresh provisions as is usual under such circumstances. But there is no real ground of complaint, no right of action unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he is therefore to have a right of action against the captain who does not provide all that he ought. You must be satisfied that there was a real grievance sustained by the plaintiff." Verdict for the plaintiff, on the count as to the supply of provisions.

vessel *without* any express contract, would be even more unusual than the making of an express contract with a common carrier. And whenever there is such contract, no usage would be permitted to defeat or control it, although usage, or other evidence, might be offered to explain it, where its meaning or operation were doubtful. And with or without such evidence, the contract would be construed, if possible, so as to give effect not only to the whole instrument, but to the meaning and intention of the parties, so far as they had expressed it.<sup>1</sup> In one case, where the passenger covenanted that if it should be necessary for the convenience and at the request of the passenger, to touch at any intermediate ports, he would pay port dues and other necessary charges, this was construed as obliging the master to stop when and where the passenger would, with only the limitation that the safety of the vessel must not be interfered with.<sup>2</sup>

<sup>1</sup> *Adderly v. Cookson*, 2 Camp. 15. Assumpsit for carrying defendant as a passenger in the *Devaynes*, East Indiaman, from Madras to England.

The defendant was a lieutenant in the company's service, and came home on a *sick certificate*. By an order of the court of directors, officers of this rank, coming home under these circumstances, are to pay 1,000 rupees and no more "for their passage and accommodation at the captain's table." The defendant paid the amount of this sum in English money into court; but the plaintiff sued for £145 more. His case was, that, for the regulation price, officers are only entitled to swing their cots in the *steerage*; that Lieutenant Cooksen had a cabin to himself; and the sum demanded was not more than he received from others who enjoyed the same advantage; but it appeared that on board the *Devaynes*, during this voyage, no officers did sleep in the *steerage*; that the cabin occupied by the defendant would have remained empty, or been filled with stores, if he had been excluded from it; and that he had not made any express promise to pay more than the thousand rupees.

Lord *Ellenborough*. "The order says nothing about sleeping in the *steerage*. Why then should the officers be confined to that part of the ship? Had any other person who would have hired this cabin been excluded from it by the defendant, and the plaintiff's profits been thereby diminished, the case might have been different. But I see nothing to raise an implied promise on the part of this defendant to pay beyond the regulated sum." Plaintiff nonsuited.

<sup>2</sup> *Corbin v. Leader*, 10 Bing. 275. The defendant, master of the ship *Oriental*, let to the plaintiff the whole of the cabins and accommodations for the conveyance of passengers on board the *Oriental*, then about to sail from Calcutta to London, touching at St. Helena. The plaintiff was to have the whole attendance of the servants, &c., but that the said servants should nevertheless be under the control of the defendant whenever he might call upon them, as captain, &c.; but with this exception they should be under the control of the plaintiff, and subject

Questions have arisen as to the passage-money, when advanced before the voyage began, and the voyage was not begun, or if begun, not completed. Each case of this kind would be determined on a consideration of its especial facts; and usage has been admitted to ascertain the rights of the parties.<sup>1</sup>

to his orders. Among the agreements was that *the defendant would promote, in as far as in him lay, the comfort and convenience of the plaintiff and his servants, &c.*, in consideration whereof the plaintiff agreed, among other things, to pay defendant a certain sum, and that he would in every respect support and uphold the authority and command of the defendant, and *in no way interfere with the management or navigation of the ship*, or with the officers thereof; and the plaintiff further agreed, that if on the progress of the voyage it should be necessary for the convenience and at the request of the plaintiff to touch or put into any other port except St. Helena, the plaintiff would bear and pay all port and other necessary charges incurred thereby or consequent thereon. Breach: — Defendant did not promote, as far as in him lay, the comfort and convenience of the plaintiff, &c. And the plaintiff said that although during the voyage it was necessary for the convenience of the plaintiff to touch at the port of the *Cape of Good Hope*, and the plaintiff was willing to bear all port expenses to be incurred thereby, and requested defendant to put into the Cape of Good Hope for the *aforesaid* purposes, yet the defendant then and there wholly neglected and refused to do so, contrary to his covenant.

*Tindal, C. J.* "I am of opinion that the judgment of the court in this cause ought to be for the plaintiff. . . . This is an express stipulation on the part of the plaintiff interwoven with the covenant of the defendant, and clearly shows that stopping in the course of the voyage was a thing contemplated by the parties as conducive to the convenience of the passengers. . . . When the plaintiff covenants that he will not interfere with the management of the ship, that applies not to touching at a port when convenience may require it, but to the discipline and control of the crew in the process of navigation. . . . If the defendant had pleaded and proved that stopping at the Cape would have interfered with the safety of the vessel, it would have been an answer to the action." *Gaselee, J.* "I am of the same opinion. The covenant of the plaintiff not to interfere with the management of the vessel is perfectly compatible with his requiring the defendant to put into the Cape for the convenience of the passengers, for that might have been done without interfering with the management of the vessel."

*Bosanquet, J.* was of the same opinion. *Alderson, J.* concurred.

<sup>1</sup> *Gillan v. Simpkin*, 4 Camp. 241. Defendant agreed to carry plaintiff to the West Indies, in the ship of which he was master, for 40 guineas. This sum plaintiff paid him before leaving London for the West Indies. There was some doubt in the evidence whether, according to the agreement, plaintiff was to be carried from London or from Portsmouth. She intended to have gone on board at the latter place, but in point of fact her baggage was shipped in the river Thames. In proceeding round from thence to Portsmouth the ship was lost. It was usual for the passage-money to be paid in London, and the stores for the use of passengers during the voyage are always put on board in the river.

When a question has arisen as to passage-money payable *pro rata itineris peracti*, principles have been applied similar to those which we have already considered in reference to freight *pro rata*.<sup>1</sup> Hence, it is important to ascertain whether the passenger accepted voluntarily his discharge from the vessel, and the termination of the passage short of the original destination.<sup>2</sup> Indeed, it may be

*Gibbs, C. J.*, "desired the jury to consider whether, with respect to the plaintiff, the voyage was to commence from London. Even in that case, if the money had been to be paid at the end of the voyage, the defendant could not have recovered any part of it, there being an entire contract to carry the plaintiff from London to Antigua. But if the voyage was commenced, and the ship was prevented from completing it by perils of navigation, the captain may be entitled to retain the passage-money previously paid to him. The contract for this purpose may either be express, or may be evidenced by established usage." Verdict for defendant. See also cases *post*, p. 630, n. 1.

In *Leman v. Gordon*, 8 Car. & P. 392, it appeared that A shipped goods on board the ship of B on a voyage to India, and also went by the same ship as a passenger. The ship was wrecked near the Cape of Good Hope. The goods were spoiled, and A returned to England. A, before he left England, gave to B a receipt for £ 250 as money advanced, including a sum of £ 95 as passage-money paid to the captain, and another sum of £ 10 for the freight of the goods, and B afterwards pocketed the amount of the insurance. Held, that in an action for money had and received, brought by A against B to recover the insurance money, B was entitled to set off the £ 95, unless it was shown that the passage-money belonged to the ship-owners, but that B could not set off the £ 10 freight, as the ship did not complete her voyage to India. Held, also, that B was not entitled to charge commission either on £ 250 or on the amount of insurance received by him. Held, also, that B could not set off any sum which he had paid to the order of A, if it was not *actually* paid before the bringing of the action, and that if he had only made himself liable to pay it, that would not have entitled him to set it off.

<sup>1</sup> *Ante*, p. 239.

<sup>2</sup> *Mulloy v. Backer*, 5 East, 316. The plaintiff contracted to carry the defendant, his family and luggage, from Demarara to Flushing, and in the course of the voyage, within four days' sail of Flushing, the ship was captured by an English ship of war and brought into England, and the ship and cargo libelled for a prize in the court of admiralty, and the cargo condemned, and the proceedings still pending against the ship, but the defendant and his family were liberated, and their luggage restored to their possession. Lord *Ellenborough, C. J.*: "If this were the case of a contract to be decided only according to the law of England, without adverting to any rule drawn from the marine law, it would be the case of a contract undertaken but not performed, and consequently the plaintiff could not be entitled to recover his wages or hire as for a partial performance of it *pro rata*. But according to the case of *Luke v. Lyde*, the marine law has been imported, as

remarked that the close analogy between questions of freight-money, and of passage-money, may be observed in many cases.<sup>1</sup>

it were, into this species of contract, and a right to recover wages or freight *pro rata* has been introduced. There it seems an implied contract was raised, if not on the ground of beneficial service performed for the defendant, at least on the ground of *labor* performed in his service by the plaintiff, for which none other but he was entitled to recover. But this is a very different case; for here, by the capture, other rights have intervened and interfere with those of the master, and pending the discussion of those rights in a court which has not only competent but exclusive jurisdiction over the question of prize, and which has power to deal with the freight, as it thinks proper, this action was brought, which assumes the right to the freight to be in the plaintiff. It is enough, therefore, to say that the action is at least premature."

<sup>1</sup> *Watson v. Duykinck*, 3 Johns. 335. The suit was an action of assumpsit for money had and received. The defendant, who was master of a sloop bound from New York to St. Thomas, agreed with the plaintiff that "in consideration of a hundred dollars he would allow the plaintiff to proceed in his sloop as a passenger on the voyage, and to load on board for transportation merchandise to the value of \$600, and that defendant would provide meat, drink, &c., for plaintiff during the voyage." Plaintiff agreed, and paid it on the same day to the defendant. The sloop sprung a leak two days after leaving New York, and was obliged to bear away for New London. On her way there, she was wrecked and lost. The chief part of the cargo was saved and brought to New York, and plaintiff's goods were delivered to him. The plaintiff assisted equally with the crew in endeavoring to save the vessel and cargo. Defendant paid expense of saving cargo and bringing it to New York. The average charge on the plaintiff's goods towards the expenses of salvage was \$20. The defendant provided no other vessel, but the plaintiff went to St. Thomas in another vessel.

The usual price for a passage to St. Thomas for a passenger is \$80, and \$50 if he finds himself. By the usage and custom of New York, passage-money is paid when the passage is taken, and is never refunded if the voyage has begun, though a subsequent accident should prevent its completion.

*Kent*, Ch. J., delivered the opinion of the court. "The general rule undoubtedly is, that freight is lost unless the goods are carried to the port of destination. The rule seems also to go further, and to oblige the master in case of shipwreck to restore to the shipper the freight previously advanced. . . .

Cleirac, in his commentary on the judgments of Oleron, art. 9, no. 9 (*Les Us et Coutumes de la Mer*. p. 42), declares that in cases of shipwreck, the master is bound to render to the merchants the advances which they may have made upon the freight, and he cites a decision of one of the early jurists in confirmation of his doctrine. . . . The policy of the general rule on this subject was to take away the temptations to negligence or misconduct, which the certainty of freight was calculated to produce in the master. . . .

The general rule being then well established, the present case turns upon this point; whether the agreement stated in the special verdict be such as to take the

In one case, where a captain had died before the voyage from the East Indies to England began, and his executors sued the mate who took command for the money paid him by passengers, the court held, in the absence of usage, that the mate was entitled to retain the passage-money of those with whom he had made the

case out of the operation of the rule. . . . This agreement did not go the length required by the French law, of stipulating that the money should at all events be retained, but it was still particularly confined to the permission to be received on board as a passenger, and to load the goods on board. Both these parts of the agreement were literally complied with. This can easily be distinguished from an agreement to transport and deliver at the place of destination. In the one case the consideration is rendered by receiving the goods on board, and making all due and *bonâ fide* efforts to carry and deliver them. I think this latter is upon the whole the better construction of the agreement before us."

See also *Moffat v. East India Co.* 10 East, 468; *Brown v. Harris*, 2 Gray, 359; *Howland v. The Lavinia*, 1 Pet. Adm. 126. In *Griggs v. Austin*, 3 Pick. 20, plaintiffs, in November, 1822, shipped on board the ship *Topaz* 904 barrels of apples for Liverpool, and paid freight to defendants in advance. No deduction was made to usual freight on account of advance payment, and there was no agreement that freight was to be allowed at all events. The ship was stranded about six miles below Liverpool, and the greater part of the plaintiff's apples were lost. Defendants contended that the freight having been paid in advance, they were not liable to repay it, the apples being lost without their fault, and there having been no agreement to refund in case of such a loss. In the bill of lading it was expressed that the apples were to be delivered "in the like good order and well conditioned at Liverpool, the danger of the seas only excepted."

*Parker, C. J.*, said: "Some reliance in support of their defence is placed upon the condition expressed in the bill of lading, that the goods are to be delivered safely, 'the dangers of the seas excepted,' but . . . we cannot see anything in that instrument which can affect the question before us. . . . It is certainly a clear principle of the common law, that when money is paid or a promise made by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money may be recovered back, or the promise founded on such consideration may be avoided between the parties to the contract. . . . A distinction was raised in the argument between payment of freight and an advance of it, it being supposed to be recoverable back in the latter case, but not in the former. But we do not find this distinction supported by authorities, nor do we see any sound reason for it. . . . It will be seen at once, that if the payment of freight thus proved were to be construed into a stipulation that it should not be recovered back, the whole doctrine of the marine law on this subject would be useless. The maxim is, that freight paid in advance, if the goods be not carried, shall be returned, unless there be a stipulation to the contrary." Judgment for plaintiffs.

contract of passage, but must return to the representatives of the captain the money received from the passengers with whom the captain had contracted, retaining only for what the mate had himself expended for stores.<sup>1</sup>

It is an important question, what is the obligation resting on the carriers of passengers, when they have contracted to carry them on a certain voyage, in a certain vessel, and the vessel is, at the time of the contract, without the knowledge of either party, a wreck, or becomes one before the voyage begins. This question has arisen, in somewhat different forms, in several cases; and the decisions cannot be reconciled. It is, indeed, obvious that these decisions of this question might rest upon either of two principles, both of which are in themselves reasonable. One way, and the simplest and most direct, would be, to say that here is a contract the execution of which has become impossible without the fault of either party; and by this impossibility the contract is discharged and its obligations cease. Hence, if the passenger has not paid his passage-money, he cannot be called upon to pay it; if he has paid it, he can recover it back from the master or ship-owner. But he can recover nothing more than the money, any damage he may have sustained not being imputable to the master or owner. This is the view which was taken in the earlier cases in which this question arose.<sup>2</sup>

<sup>1</sup> *Siordet v. Brodie*, 3 Camp. 253.

<sup>2</sup> *Briggs v. Vanderbilt*, 19 Barb. 222, was an appeal from a judgment entered upon the report of a referee. There were seven other actions brought against defendants for the same causes of action as those in controversy in this suit. The plaintiffs, on the 5th March, 1852, embarked on the *Prometheus* at New York for San Francisco. The complaint in each action alleged a contract made, for the consideration of \$ 250, to convey plaintiffs and their baggage as second cabin passengers from New York to San Francisco, &c., &c., and alleged a failure to carry beyond the Isthmus, and consequent damage in expenses going and returning, and, while there, loss of time and health.

By the court, *Strong, J.*: "If the referee was right in supposing the plaintiffs' only substantiated claim was for a return of the money advanced for the passage in the steamer *North America* on the Pacific, as paid on the mistaken supposition that she was capable of performing the service, when she was in fact a wreck at the time, he erred in awarding the money on the third count in the complaint. That count was for a breach of the contract; but upon the principle assumed by the referee, the contract was inoperative for any purpose, and the plaintiff was entitled to a restoration of his money, because the condition on which it had been

But it is obvious that another view may be taken. The ship-owner has contracted to carry a passenger to a certain place. If the ship be burned, that is incidental to the contract, and is not of its essence. If, therefore, he cannot carry him in the ship intended or named, he is now bound to carry him in another ship if that can be procured, and if he fails to do this, will be liable for damages. It will occur to the reader that this is another instance of the analogy between contracts for freight and contracts for passage; for the view just stated is little else than an application to the contract for passage, of the principle of transshipment already

paid had wholly failed. It was so much money had and received by the defendants for the plaintiffs' use, and could be recovered back under the appropriate money counts. . . . The evidence adduced showed that the defendants were joint owners of the *North America*, and that they had through their agent promised to transport the plaintiff on board of that steamer from San Juan del Sud to San Francisco. . . . In this case there were three distinct concerns,—on the Atlantic, on the Isthmus, and on the Pacific,—and there were different and separate owners of the steamers on the Pacific. . . . Each made its own charge, not dependent in any manner upon the others, and there was no agreement to share any profit or loss. There was not, therefore, any partnership." . . .

A similar case, founded on similar facts and raising similar questions, was decided in the same way. *Bonsteel v. Vanderbilt*, 21 Barb. 26. *Parker, J.*, delivered the opinion of the court, *Watson, J.*, dissenting. . . . "I think the plaintiff under the proof in the cause was entitled to recover against Vanderbilt and Drew, and the only remaining question is as to the rule and extent of the damages. . . . There was a failure of the consideration for which the plaintiff paid his money, but it was no more the fault of the defendants than of the plaintiff, that the contract was not performed. . . . Since the verdict in this cause, all the questions which arose on the trial have been deliberately examined and decided . . . in the case of *Briggs* against these same defendants. . . . The contract was made at the time of the sale of the tickets, and the language of the ticket admits the payment of the passage-money, and expresses the nature and extent of the engagement. The ticket is more than a mere receipt. Each ticket conveyed to the plaintiff the right to a second-cabin passage in a certain steamship, on her next passage to a certain port. . . . The defendants surely did not indemnify against the unhealthfulness of the climate, and the thousand annoyances and vexations incident to a transit across the Isthmus. . . . No care and no foresight on their part could probably have secured to all either comfort or health on the voyage. Many of the evils were incident to the climate and country, and beyond human control; and a proposal to guarantee in the contract against most of the sufferings complained of would have been promptly declined. . . . I think the only legal claim growing out of the transaction is the right of the plaintiff to recover against Vanderbilt and Drew the amount paid them for passage-money on the *North America*, with interest."



considered in reference to contracts for freight.<sup>1</sup> And it is this last view which has been taken in the latest cases, in which the earlier cases were overruled.

The general rules in regard to baggage applicable to carriers by

<sup>1</sup> In *Williams v. Vanderbilt*, 29 Barb. 491, 496, *Strong, J.*, said: "The designation, in the ticket, of a particular ship, as the ship in which the plaintiff was to have passage, would doubtless, if the vessel had not then been lost, or a loss had been subsequently occasioned by the act of God, as the destruction of the vessel in a storm, have entitled the plaintiff to be carried in that ship, and limited the obligation of the defendant to carry to that ship. But I do not think the designation amounted to an absolute, unconditional contract to carry by that ship, from the obligation of which the defendant could not be relieved by such an act of God as aforesaid. . . . The designation in the ticket of the vessel is a mere specification of the mode in which the duty was to be performed, and to that extent controlled the duty. . . . And it is a rule well settled that 'where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, the law will excuse him.' (*Paradine v. Jane*, Aleyn's R. 27, *Harmony v. Bingham*, 2 Kern. 99, and cases here cited.) . . . The substance of the duty assumed and intended to be assumed by the defendant, as a common carrier of passengers, was to carry the plaintiff to California. As such a carrier, the law required of him to provide suitable conveyances and accommodations. . . . The plaintiff was entitled to a passage over the route, and defendant was under obligation to furnish it as soon as it could reasonably be done, notwithstanding the loss of the vessel. . . . To hold the defendant discharged from all obligation as to the rest of the route, except, perhaps, to refund a proportion of the passage-money applicable to it, . . . would violate the leading intention of both parties in the sale and purchase of the tickets, and inflict on the plaintiff the most monstrous injustice."

On appeal to the general term, 29 Barb. 503, *Smith, J.*, said: "It being settled, therefore, that the defendant was a common carrier from New York to San Francisco, it follows that he was bound to forward the plaintiff within a reasonable time, and when it was ascertained that one of the vessels on the Pacific was lost, it was his duty to provide another with all reasonable diligence. . . . Did the defendant exercise all reasonable diligence in providing another vessel to take the plaintiff to California? . . . On this question of fact the evidence was not very strong or conclusive. . . . The charge of the judge was guarded, careful, and unexceptionable, and . . . we are not at liberty to disturb the verdict."

In *Williams v. Vanderbilt*, 28 N. Y. 217, it was held that the time the plaintiff lost by reason of his detention on the Isthmus, his expenses there, and of his return to New York, the time he lost by reason of his sickness, after he returned to New York, and the expenses of his sickness *so far as the same were occasioned by defendant's negligence or breach of duty*, were legitimate and legal damages which the plaintiff might recover; and that if the loss of one steamer was the act of God, it was the duty of the carrier to exercise diligence in

land, apply with equal force to carriers by water. What constitutes a delivery of baggage to a vessel, we have already considered;<sup>1</sup> and it has been held that the owner of a vessel may contract with a passenger not to be liable unless a bill of lading is given for the baggage.<sup>2</sup> Generally, however, no special contract is made in regard to the baggage, and the passage-money is compensation for carrying the baggage as well as the passenger.<sup>3</sup> It has been held that if the baggage belonging to a steerage passenger is in his exclusive possession, the owners of the vessel are not liable if the baggage is stolen;<sup>4</sup> but the owner of a ship has been held liable for the loss of a trunk stolen from the state-room of a passenger.<sup>5</sup>

On the arrival of a vessel at her port of destination a passenger should obtain his baggage as soon as practicable, but he is not obliged to expose himself in a crowd or to endanger his safety thereby.<sup>6</sup>

The question as to what is baggage for which a passenger-carrier is liable is one of some difficulty. As a general rule, it includes only articles of a personal nature necessary to the convenience of the passenger.<sup>7</sup> It clearly does not include merchandise;<sup>8</sup> nor jewelry intended as presents for friends, nor masonic

providing another vessel for the carriage of the plaintiff; and that the plaintiff could recover back the money he had paid to be carried to San Francisco, and his expenses while necessarily detained on the Isthmus, &c., if his detention and attendant circumstances alleged were justly imputable to the defendant's neglect of duty. *Balcolm, J.*, said: "The true rule touching this question is laid down by Professor *Parsons*. He says: "The non-performance of a contract is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible." See also *West v. Steamer Uncle Sam*, 1 M'All. C. C. 505.

<sup>1</sup> See *ante*, p. 184, note.

<sup>2</sup> *Wilton v. Atlantic Nav. Co.* 10 C. B. N. S. 453.

<sup>3</sup> *The Elvira Harbeck*, 2 Blatchf. C. C. 336.

<sup>4</sup> *Cohen v. Frost*, 2 Duer, 335.

<sup>5</sup> *Van Horn v. Kermit*, 4 E. D. Smith, 453. The trunk in this case was stolen two days after the vessel arrived in port, and it was held that although the owners of the vessel were not liable as common carriers, yet the burden was on them to show that they were not guilty of negligence.

<sup>6</sup> *Nevins v. Bay State Steamboat Co.* 4 Bosw. 225.

<sup>7</sup> *Van Horn v. Kermit*, 4 E. D. Smith, 453; *Wilton v. Atlantic Nav. Co.* 10 C. B. N. S. 453.

<sup>8</sup> *Whitmore v. Steamboat Caroline*, 20 Misso. 513.

regalia used by a passenger on his travels, nor engravings.<sup>1</sup> But money intended for travelling expenses may be carried in a trunk;<sup>2</sup> and generally, in considering the amount of baggage which a traveller may reasonably have, the jury may take into view his residence, business, station in life, the place from which he came and that to which he is going.<sup>3</sup>

If a passenger does not accompany his baggage, the carrier may claim compensation in advance for its transportation, or may postpone his claim until delivery and rely upon his lien for freight, or the personal responsibility of the owner, and in either case the vessel is liable as in the case of an ordinary shipment.<sup>4</sup>

### SECTION III.

#### OF THE POWER AND DUTY OF THE MASTER AS TO PASSENGERS.

Passage by water is so different in many respects from passage by land, that while the general principles applicable to both are essentially the same, they are importantly modified by the peculiarities of either mode of passage. In nothing is this more true, than in reference to the power and duty of the master of a ship. He must be, from the necessities of his employment, clothed with almost despotic authority over all on board his ship; for the safety of all the persons and all the property may depend upon the preservation of discipline, and the prompt obedience to every command. But, whatever be the power of the master while at sea, when he reaches shore he is always held responsible to all whom it concerns, for the excessive use of this power while at sea, and must respond in damages for any injury caused by his wrongful acts of omission or commission, of negligence,<sup>5</sup> or of oppression and active wrong.

The power of the master need not be, and therefore is not, so

<sup>1</sup> *Nevins v. Bay State Steamboat Co.* 4 Bosw. 225.

<sup>2</sup> *Duffy v. Thompson*, 4 E. D. Smith, 178; *Merrill v. Grinnell*, 30 N. Y. 594.

<sup>3</sup> *Nevins v. Bay State Steamboat Co.* 4 Bosw. 225.

<sup>4</sup> *The Elvira Harbeck*, 2 Blatchf. C. C. 336.

<sup>5</sup> *Malton v. Nesbit*, 1 Car. & P. 70. An action on the case. The declaration stated that the defendants were owners of the ship *Apollo*, and that the plaintiff took his passage in that ship from Madras to London, and paid £175 to defendant for it, and that it became his duty to carry him safely (acts of God and

great in the case of passengers, as over the crew; nor would a master have any right to call on a passenger, under ordinary circumstances, to do duty as one of the crew. But a passenger on board a ship, in a time of peculiar and extraordinary exigency or peril, shares in the common danger, and may well be required to contribute to the common efforts for safety. Then it is plain, that if he works at all he would do little good and might do much harm, if he did not work with the rest in obedience to the orders which give to the efforts system and efficacy. The result is, that the master has a right to command and compel the service of a passenger, in case of actual danger from a peril of the sea; to work at the pumps, for example, if the ship leaks,<sup>1</sup> or to assist in reducing sail, and the like. And the master has a similar power if an attack by an enemy be made or apprehended.<sup>2</sup>

There would seem, however, to be this limitation on the master's power. He can require no more exertion or exposure on the part of the passenger than is strictly necessary;<sup>3</sup> and certainly

king's enemies excepted), yet that by reason of the *negligence* of the defendants and their servants, the ship was wrecked, and plaintiff was injured by having to pay for his passage in another ship, and by having to stay for some time at the Cape of Good Hope. Evidence was given that for some hours before the wreck the ship was in Table Bay, and no soundings were made nor lookout kept. This was confirmed by many witnesses. Evidence was also given of the loss incurred by the plaintiff in consequence of the wreck of the ship. *Abbott, C. J.* left the case to the jury on the question of negligence or no negligence. Verdict for plaintiff.

<sup>1</sup> See Vol. II. Chapter on Salvage.

<sup>2</sup> *Boyce v. Bayliffe*, 1 Camp. 58.

<sup>3</sup> *Boyce v. Bayliffe*, 1 Camp. 58. Action for assault and false imprisonment on board the *Huldart*, East Indiaman, from Bombay to London; *per quod* the plaintiff was obliged to leave that ship and take his passage home on board another. Plaintiff was a passenger in the gunner's mess, and defendant was master of the ship. One evening, near the Cape of Good Hope, two strange sail were descried, supposed to be enemies. Defendant immediately mustered all hands on deck, and assigned to every one his station. The plaintiff, with the other passengers, he ordered on the poop, where they were to fight with small arms. This order all readily obeyed except the plaintiff, who, conceiving that he had been ill-used by the defendant sometime before, in being forbidden to walk on the poop, positively refused to go there, but offered to fight in any other part of the ship with his messmates. The defendant for this contumacy ordered him to be carried upon the poop, and there kept in irons during the whole night. Next morning no enemy appeared, and the ship arrived safe at St. Helena on the 17th June.

cannot require him to do what might be safe enough to a practised seaman, but would be very dangerous to a landsman ; as, for example, to go out upon a yard-arm and furl a sail in a tempest.

We shall consider in our chapter on salvage when a passenger is entitled to compensation for services rendered the vessel on which he is.

If the exigencies of his position and service confer upon a master of a ship the largest authority, they impose upon him an equal duty. It is not more certain that the safety of all on board is to a great degree dependent upon the skill and care of the master, than that the comfort of the passengers is, in at least an equal degree, dependent upon his conduct. If he be tyrannical, oppressive, rude and indecent in his behavior, he makes them unhappy through the whole voyage which puts them in his power. It was intimated, in a case before Mr. Justice Story, that facts of this kind might be offences against morality, but were such as the law could not punish. But the judgment of the court was, that the law involved no such absurdity ; and it was held that " the contract of the passengers with the master is not for mere ship-room and personal existence on board, but for reasonable food, comforts, necessaries, and kindness. It is a stipulation not for toleration merely, but for respectful treatment, for that decency of demeanor, which constitutes the charm of social life, for that attention which

Here the plaintiff quitted her, and gave £100 for his passage home on board another ship. The only question of law arose as to the plaintiff's right to recover the £100 as a special damage. Lord *Ellenborough* said it was necessary the special damage should be closely connected with the trespass which was the foundation of the action. That a man may transship himself, and throw the expense of this upon another, the injury must continue down to the moment of his leaving the first ship, and he must then act with a view to the preservation of his life, or at least from a reasonable regard to his own safety. In this case, as the plaintiff had refused to obey orders given him, perhaps his confinement might be necessary to the discipline of the crew and the security of the vessel, and if so would be justifiable in law. However, when it came out that the plaintiff had been kept all night in irons upon the poop, his lordship clearly held that the defendant had exceeded the limits of his authority. He thought decidedly that the defendant was implicated in the false imprisonment, having committed an assault in aid of those who had the plaintiff in their custody. The defendant in this suit was Major Douglas, a passenger on board the *Huddart*, who, while they were about to put the plaintiff in irons on this occasion, held up the butt end of a musket to him in a menacing manner, and threatened to strike him.

mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach, which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors, by the excitement of terror, and cool malignancy of conduct, to inflict torture upon susceptible minds."<sup>1</sup>

A duty rests on the passenger analogous to that which the law imposes on the captain. It is certain that he must not conduct himself so as to weaken the due authority of the master or officers,

<sup>1</sup> *Chamberlain v. Chandler*, 3 Mason, 242. This was a libel in the admiralty brought by the libellants, who were passengers on board the ship *Pearl* from Woakoo to Boston, against defendant, who was master of the ship, for damage for asserted ill treatment and injuries to them during the passage.

In *Nieto v. Clark*, 1 Clifford, C. C. 145, it was held that where a steward had attempted a rape on a female passenger in a foreign port, and the injured party refused to remain on board, and demanded the return of her passage-money, unless the offender was dismissed, the master was justified in immediately discharging the seaman; and the law laid down in the preceding case was fully affirmed.

In *McGuire v. The Golden Gate*, 1 M'All. 104, the judge said: "The proceeding in this case is a libel against the vessel for the breach of contract, arising out of assaults and batteries committed by the master and officers of the ship on two of the passengers. . . . In this case the testimony ascertains that the ill-treatment of the two passengers, the libellants, by the captain and his officers, was inflicted while in the avowed preservation of the discipline and police of the ship. They were acting directly in the employment of the owners. But, acting within its scope, they exceeded its limits, and, in analogy to the case of *Sherwood v. Hall*, 3 Sumn. 130, where the owner was made liable for the abuse by the master of his authority to enlist, the owners in this case must be made liable for the abuse and excessive use of the authority confided to them. . . . In the case of *The Amiable Nancy*, 3 Wheat. 558, a libel was filed to recover damages for a marine tort. The court say: 'Upon the facts disclosed in the evidence this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. And if this were a suit against the original wrong-doers, it might be proper to go yet further, and visit upon them in the shape of exemplary damages the proper punishment which belongs to such lawless misconduct.' . . . In this case, the libellants were steerage passengers on board the *Golden Gate*. They are represented to be laboring men without means, and have, therefore, filed their bill *in formâ pauperis*. . . . In actions against innocent owners, while the policy of the law holds them liable for actual damages as proved, these cannot be enhanced to admonish the guilty."

or interfere with the management of the vessel, or expose his fellow-passengers, or indeed any persons on board, to annoyance or unnecessary inconvenience. If he does so, the master may coerce him into better behavior, or remove him from the society of those whom he annoys. It is not meant that the captain should, or may, interfere with his passengers on slight grounds,—for a mere “want of polish,” as is said in one case,—but only where grave reasons exist, of the kind above indicated. And then he must go no further in the restraint or coercion of an unruly passenger, than is reasonably necessary to prevent further mischief.<sup>1</sup>

<sup>1</sup> *Prendergast v. Compton*, 8 Car. & P. 454. The defendant was captain of a ship on a voyage from Madras to London, and in consideration, &c., defendant promised that plaintiff and his wife should be treated as cuddy passengers, and that he would provide them with good and sufficient food and drink, and permit plaintiff to take due and proper exercise, &c. Plaintiff and his wife complain that defendant did not provide them with good and proper food, and would not suffer plaintiff to take due recreation by walking in reasonable parts of the ship, &c. The sixth plea stated that the cuddy passengers were accustomed to take their meals at the same table as the captain, and the captain superintended at said table as his table, and that it was usual for persons taking their meals there to conduct themselves in a decorous manner, according to the rules of good breeding; and that the plaintiff on the 20th of Ju'y, and divers other days, vulgarly &c., and contrary to the rules of good breeding, &c., although there were all the usual and proper implements on the table, wherewith the plaintiff could and ought to have helped himself to what he wanted, he helped himself to meat and potatoes, &c., by seizing and laying hold of them with his fingers and hand, and vulgarly, and rudely, &c., conducted himself, &c.

*Tindal, J.*, in summing up said: “I think you may consider the question upon the first and third grounds, . . . the unfitness of the plaintiff to associate with the other passengers. The question for you is, whether the defendant has shown that he had a good cause of justification for the exclusion of the plaintiff from the cuddy, and from certain parts of the deck? The plaintiff complains that his wife also was excluded from the cuddy; but in fact she was not excluded, except so far as a proper feeling on her part would lead her to remain with her husband. The defendant rests his defence on three distinct grounds, all of which he says operated on his mind at the time. First, he says that the conduct of the plaintiff was vulgar, offensive, indecorous, and unbecoming. There is some evidence that he was in the habit of reaching across other passengers, and of taking potatoes and broiled bones with his fingers. It would be difficult to say, if it rested here, in what degree want of polish would, in point of law, warrant a captain in excluding a passenger from the cuddy. Conduct unbecoming a gentleman, in the strict sense of the word, might justify him; but in this case there is no imputation of the want of gentlemanly principle. . . . The third ground is the threat used by the plaintiff that he would cane the defendant. . . . I cannot conceive that such

## SECTION IV.

## OF THE OBLIGATION OF THE SHIP-OWNER.

We have heretofore considered fully the implied warranty of seaworthiness; and have no doubt that the whole of this would rest on the ship-owner, as to his passengers, as much as to his cargo or his insurers; so far, at least, that if a passenger suffers from a breach of this obligation, which could be imputed to the ship-owner as his own fault, or that of his master, he would be responsible in damages. And this seaworthiness of the ship includes not only whatever is necessary to carry the passengers with safety, but all those articles of accommodation, food, and the like, which the passengers have a right to require. And it is obvious that these must vary indefinitely, from those which belong to the passengers in the hold of an emigrant ship, to the first-cabin passengers of a liner. The general rule must be, for passengers on land and passengers by water, that the carrier contracts to give them the usual reasonable accommodations. And if any particular advantage is by public advertisement offered by a certain line, as, for example, that all the vessels of this line have a competent surgeon on board, it may well happen that a passenger chooses this line rather than any other, that he may have this very advantage.

Another question has repeatedly arisen of late years, in respect to land carriage.<sup>1</sup> It is, whether the carrier is liable for himself

conduct would not justify that exclusion. . . . If the whole of the defendant's justification is made out, you will find your verdict for him. If it is not made out, you will find your verdict for the plaintiff." Verdict for plaintiff, damages £25; on some of the issues, for the defendant. See also *Noden v. Johnson*, 16 Q. B. 218, 2 Eng. L. & Eq. 201, where the action was trespass, for that the defendant "assaulted the plaintiff, and beat, bruised, &c." Plea, "as to the assaulting and ill-treating plaintiff, &c., a justification in that plaintiff made a great noise, disturbance and affray on board said vessel, and was then fighting with another person then also being a passenger on board said vessel," and was striving to beat said person; wherefore the defendant, as such captain, to preserve peace and order, and to prevent the beating and wounding of such person, gently laid hands on the plaintiff, which was the trespass complained of. Held, first, that it was quite immaterial who the person was with whom plaintiff was fighting. If he was fighting with any one, defendant might justify.

<sup>1</sup> *Straiton v. New York R. 2 E. D. Smith*, 184; *Sprague v. Smith*, 29 Vt. 421; *Ellsworth v. Tartt*, 26 Ala. 733; *Najac v. Boston R. 7 Allen*, 329; *Quimby*



only, or for others, on the ground of a *quasi* partnership. And the same question has arisen in some cases where the carriage was by water. It is difficult to define with precision the line which separates the associated action of carriers, which does not suffice to make them partners, from that which has this effect. From the cases already cited in the notes, it seems that the employment of a common agent, with authority to sell what are called coupon tickets over all the parts traversed by the carriers, does not, of itself, suffice to make them partners. But it must be certain, that a joinder in expenses and profits and management, which would bring them in any other business within the law of partnership and the liabilities of partners, would have a similar effect in this business. We give in our notes the cases in which this question has arisen, in relation to the carriage of passengers by water through the whole route or through a part of it.<sup>1</sup>

*v. Vanderbilt*, 17 N. Y. 306; *Carter v. Peck*, 4 Sneed, 203; *Northern R. v. Scholl*, 16 Md. 331; *Cary v. Cleveland R.* 29 Barb. 35; *Glasco v. New York R.* 36 Barb. 557; *Van Buskirk v. Roberts*, 3 N. Y. 661; *Illinois Central R. v. Cope-land*, 24 Ill. 332.

<sup>1</sup> *Fairchild v. Slocum*, 19 Wend. 329. In November, 1832, a contract was entered into in the city of New York, by S. T. Armstrong, as agent of the defendants, to transport a lot of merchandise belonging to plaintiff from New York to Ogdensburgh. The defendants had represented themselves to the public as the "Albany and Oswego Line," a *transportation company* carrying freight between Albany and Oswego on the Erie Canal, and keeping good and substantial vessels plying between Oswego and Ogdensburgh, as well as all other ports on Lake Ontario, &c. Three of the defendants were partners, carrying on business at Oswego, under the style of J. T. Trowbridge & Co. They owned vessels and forwarded goods from that place to the various ports and places on Lake Ontario and the St. Lawrence river. Two others of the defendants were also partners at Oswego, and engaged in the same business as J. T. Trowbridge & Co. Three others of the defendants (the whole number being eight) resided at Syracuse, on the canal route from Albany to Oswego, and were *severally* interested in the "Albany and Oswego Line" of canal boats, but had no interest in the vessels or the forwarding of goods on Lake Ontario, and on the other hand J. T. Trowbridge & Co. had no interest in the canal boats. The goods were forwarded from New York to Albany by a line of towboats, the defendants paying the freight to the owners of the boats; from Albany to Oswego they were forwarded by the defendant's line of canal boats, and at the latter place were safely delivered and shipped for Ogdensburgh on board a schooner called the *Caroline*, owned by the defendants, J. T. Trowbridge & Co. The *Caroline* sailed from Oswego, and having met with a squall was capsized; some of the goods were lost and others damaged, and for the injury thus sustained this action was brought.

## SECTION V.

## OF THE RIGHTS OF PASSENGERS TO COMPENSATION FOR DAMAGES.

The consideration for the contract of the carrier is the passage-money of the passenger. This should, therefore, be paid in the

The two questions litigated on the trial were: 1. Whether Armstrong had authority to contract for carrying goods beyond Oswego; and 2d. Whether the loss was occasioned by improperly loading or navigating the vessel.

By the court: "It is a matter of no moment that the defendants were not interested in the towboats by which the goods were forwarded from New York to Albany; nor is it material as to the result of this case that they had no joint interest in the vessels employed on the lake. They were engaged in the business of carriers, and whether they used their own boats and vessels or employed the vessels of other persons to carry for them on some part or even all of the route, can be a matter of no consequence. It is enough that they received the goods on an undertaking to carry and deliver them at Ogdensburgh, and it was not for the plaintiff to inquire in what particular manner they intended to perform the contract. . . . Although, by the contract, the defendants were not answerable for the dangers of Lake Ontario, yet if the loss happened through the want of ordinary care or skill in lading or navigating the vessel, I think they would be liable." See also *Briggs v. Barbour*, 19 Barb. 222; *Bonsteel v. Vanderbilt*, 21 Barb. 26; *Williams v. Vanderbilt*, 29 Barb. 491, 28 N. Y. 217. In *Mohawk R. v. Niles*, 3 Hill, 162, *Bronson, J.* said: "As I understand this case, the defendants were engaged in the transportation of freight and what were called consignee passengers, between the city of New York and various places at the West, by the way of the Hudson river, the canals, and lakes. In the spring of 1839 they entered into an agreement with the plaintiffs, by which it was mutually agreed, that the defendants should deliver their up freight and passengers to the plaintiffs at Albany, and their down freight at Schenectady, . . . and that the plaintiffs should transport the freight and passengers over their road, and then re-deliver them to the defendants or to the consignees. The contract in respect to the price for transportation, made between the owners of the goods and the defendants, was to govern the compensation of the plaintiffs, and they were to be paid in the proportion that thirty miles bore to the whole distance the goods 'were transported on the canal.' . . . I am unable to see that this makes out a partnership between the parties. There was no community of interests, or a division of the profits of a joint concern between the parties. . . . The contracts for transportation were all made between the defendants and the owners of the goods. . . . In short, the case comes to this: The defendants, having undertaken to perform work and labor for third persons, employ the railroad company to do a part of the work for them, agreeing that they will pay the company for its services the same price in proportion to distance which the defendants are themselves to receive. I do not see how this makes out a partnership either as between the parties themselves or in relation to third persons."

usual way, and at the usual time ; or if not paid then, the passenger must be ready to pay it whenever demanded at a reasonable time, and in a proper way. But if he be carried for the sake of some indirect advantage or benefit to the carrier, as to induce others to go, or for the freight of goods he carries, and this is understood between the parties, it constitutes a binding contract. But if the passenger is carried gratuitously, or entirely without compensation, it would seem that there is no contract, and therefore can be no breach of contract, and that the carrier can only be liable for wrong done.<sup>1</sup> That a carrier may contract with such a passenger to the effect that the carrier will not be liable for any injury not caused by the fraud, or the reckless and wilful wrongdoing of his servants, seems clear.<sup>2</sup> And we have high authority for saying that he may make a contract exempting himself from liability, under any circumstances, for the negligence of his servants.<sup>3</sup>

The private carrier of passengers on land is liable only for his default ; and only where that amounts to ordinary negligence, or want of ordinary care. The common carrier of passengers on land is liable for any injury which he might have prevented by the extremest care. We know no reason or authority for saying that these rules are not equally applicable to the carriage of passengers on the water. We have seen that the rule which makes the common carrier insurer of goods, excepting against the act of God or the public enemy, applies equally on land and on water, excepting so far as the relations between the carrier and the shipper are defined and controlled by bills of lading. There are no bills of lading for passengers, and this may make the distinction between private carriers and common carriers on water, more important in reference to passengers than it is as to goods. Practically, however, as we have already said, passengers by vessels which are not certainly common carriers, are carried under express contracts. And passengers in vessels that are common carriers, come under the universal rule ; and we should expect that the carrier would be held responsible for any injury, unless it happened from the act

<sup>1</sup> See *Steamboat New World v. King*, 16 How. 469.

<sup>2</sup> *Wells v. New York R.* 26 Barb. 641 ; *Boswell v. Hudson R.* 5 Bosw. 699.

<sup>3</sup> *Wells v. New York R.* 24 N. Y. 181.

of God or of the public enemy, or could not have been prevented by the extremest care on the part of the carrier.<sup>1</sup>

## SECTION VI.

### OF THE STATUTES RELATING TO PASSENGERS ON THE WATER.

In England, statutes have been passed regulating the carrying of passengers in ships. In this country they are still more necessary, from the immense numbers of emigrants to our shores from nearly all parts of the Old World. And we have statutes providing, with some minuteness, against the suffering and danger to which passengers are exposed on crowded emigrant ships, whether under canvas or steam. These statutes we give in our Appendix.

It may be well to add, that questions have arisen how far State statutes in relation to passengers from foreign countries by water, conflict with the power "to regulate commerce" which is given by the national Constitution to Congress, and are, therefore, void. In one case the question was, whether a statute of New York requiring the master of every vessel to report, on his arrival, the names, ages, and legal settlements of all his passengers, under heavy penalties, was open to this objection of unconstitution-

<sup>1</sup> See *Steamboat New World v. King*, 16 How. 469. In *Simmons v. New Bedford Steamboat Co.* 97 Mass. 361, a passenger was injured by a boat, which was hung by davits over the main deck, falling upon him. The immediate cause of the fall was the getting into the boat by other passengers. The court said: "A carrier of passengers for hire is not, like a common carrier of goods, an insurer against everything but the act of God and public enemies. He is not held to take every possible precaution against danger; for to require that would make him an insurer to the same extent as a carrier of goods, and might oblige him to adopt a course of conduct inconsistent with the economy and speed essential to the proper dispatch of his business. But he is bound to use the utmost care which is consistent with the nature and extent of the business in which he is engaged, in the providing of safe, sufficient, and suitable vehicles or vessels, and other necessary or appropriate instruments and means of transportation, as well as in the management of the same, and in making such reasonable arrangements as a prudent man would make to guard against all dangers, from whatever source arising, which may naturally and according to the usual course of things be expected to occur. . . . They were bound to use the utmost skill and care of prudent men in taking precautions to prevent any passenger from being injured by the ignorant, negligent, or reckless acts of other passengers."

ality; and it was held that it was not, because it was not a regulation of commerce, but a measure of internal police.<sup>1</sup> But statutes of New York and of Massachusetts imposing a tax upon alien passengers, have been held to be void, because unconstitutional,<sup>2</sup> inasmuch as they interfered with the regulation of commerce.

<sup>1</sup> *City of New York v. Miln*, 11 Pet. 102. In February, 1824, the legislature of New York passed "an act concerning passengers in vessels arriving in the port of New York." By one of the provisions of the law, the master of every vessel arriving in New York from any foreign port, or from a port of any of the States of the United States other than New York, is required, under certain penalties prescribed in the law, within twenty-four hours after his arrival, to make a report in writing, containing the names, ages, and last legal settlement of every person who shall have been on board the vessel commanded by him during the voyage, and if any of the passengers shall have gone on board any other vessel, or shall during the voyage, have been landed at any place with a view to proceed to New York, the same shall be stated in the report. The corporation of the city of New York instituted an action of debt under this law against the master of the ship *Emily*, for the recovery of certain penalties imposed by this act; and the declaration alleged that the *Emily*, of which William Thompson was the master, arrived in New York in August, 1829, from a country out of the United States, and that one hundred passengers were brought in the ship in the voyage, and that the master did not make the report required by the statute referred to. The defendant demurred to the declaration, and the judges of the circuit court being divided in opinion on the following point, it was certified to the supreme court, "That the act of the legislature of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void."

The supreme court directed it to be certified to the circuit court of New York, "that so much of the section of the act of the legislature of New York as applies to the breaches assigned in the declaration, does not assume to regulate commerce between the port of New York and foreign ports; and that so much of the said section is constitutional."

The act of the legislature of New York was held to be not a regulation of commerce, but of police; and being so, it was passed in the exercise of a power which rightfully belonged to the State. *Story, J.*, dissented.

<sup>2</sup> *Passenger Cases*, 7 How. 283. The cases of *Smith v. Turner* and *Norris v. City of Boston* were argued together. Mr. Justice *McLean* said: "The plaintiff in error was master of the British ship *Henry Bliss*, which vessel touched at the port of New York in the month of June, 1841, and landed two hundred and ninety steerage passengers. The defendant in error brought an action of debt on the statute against the plaintiff, to recover one dollar for each of the above passengers. A demurrer was filed, on the ground that the statute of New York was a regulation of commerce, and in conflict with the Constitution of the United States. The supreme court of the State overruled the demurrer, and the court of errors

affirmed the judgment. This brings before this court, under the twenty-fifth section of the judiciary act, the constitutionality of the New York statute.' After a lengthy and able examination, covering the whole ground, Mr. Justice *McLean* held the act to be void. In *Norris v. City of Boston*, the plaintiff being an inhabitant of St. John, in the province of New Brunswick and kingdom of Great Britain, arriving in the port of Boston from that place, in command of a schooner called the *Union Jack*, which had on board nineteen alien passengers, for each of which two dollars were demanded of the plaintiff and paid by him, on protest that the exaction was illegal, an action was brought to recover back the money from the city of Boston. Mr. Justice *McLean* in this case held that the judgment of the supreme court should be reversed, the act imposing the tax being void.

Mr. Justice *Wayne* said: "I agree with Mr. Justice *McLean*, Mr. Justice *Catron*, Mr. Justice *McKinley*, and Mr. Justice *Grier*, that the laws of Massachusetts and New York, so far as they are in question in these cases, are unconstitutional and void. I would not say so if I had the least doubt of it; for I think it obligatory upon this court, when there is a doubt of the unconstitutionality of law, that its judgment should be in favor of its validity. . . . I think the court means to decide:—

"1. That the acts of New York and Massachusetts, imposing a tax upon passengers, either foreigners or citizens, coming into the ports in those States, either in foreign vessels or vessels of the United States from foreign nations, or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the Constitution to Congress of the power to regulate commerce with foreign nations, and among the several States.

"2. That the States of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws, and that the commerce of the United States includes an intercourse of persons as well as the importation of merchandise.

"3. That the acts of Massachusetts and New York in question in these cases conflict with treaty stipulations existing between the United States and Great Britain.

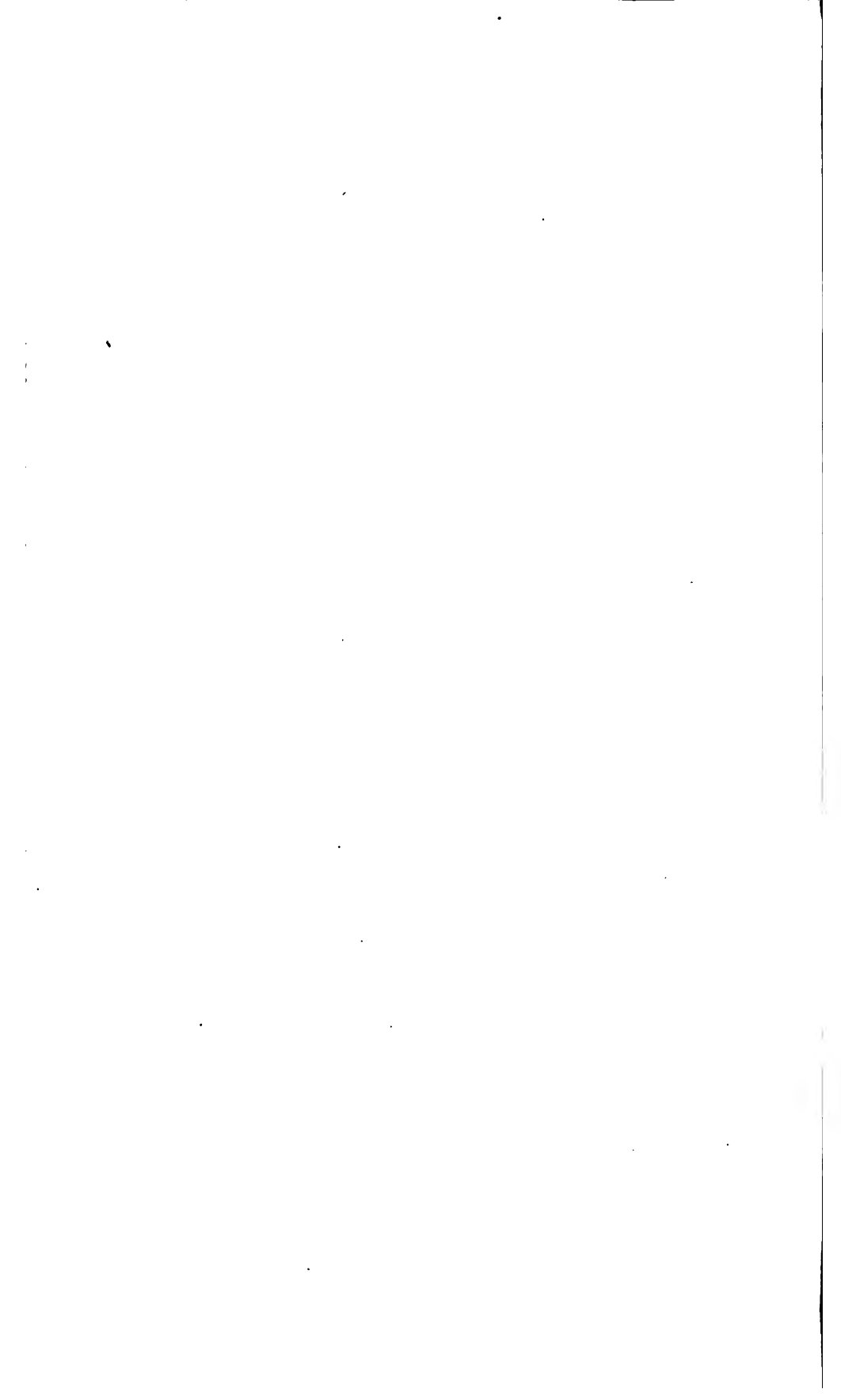
"4. That the acts in question are in violation of acts of Congress.

"5. That the acts in question are contrary to the grant to Congress of the power to regulate commerce with foreign nations, &c., and to the legislation of Congress under the said power, by which the United States are laid off into collection districts, &c.

"6th, 7th, and 8th, are modifications of the others; and the 9th rehearses the powers which the Constitution gives to the various States."

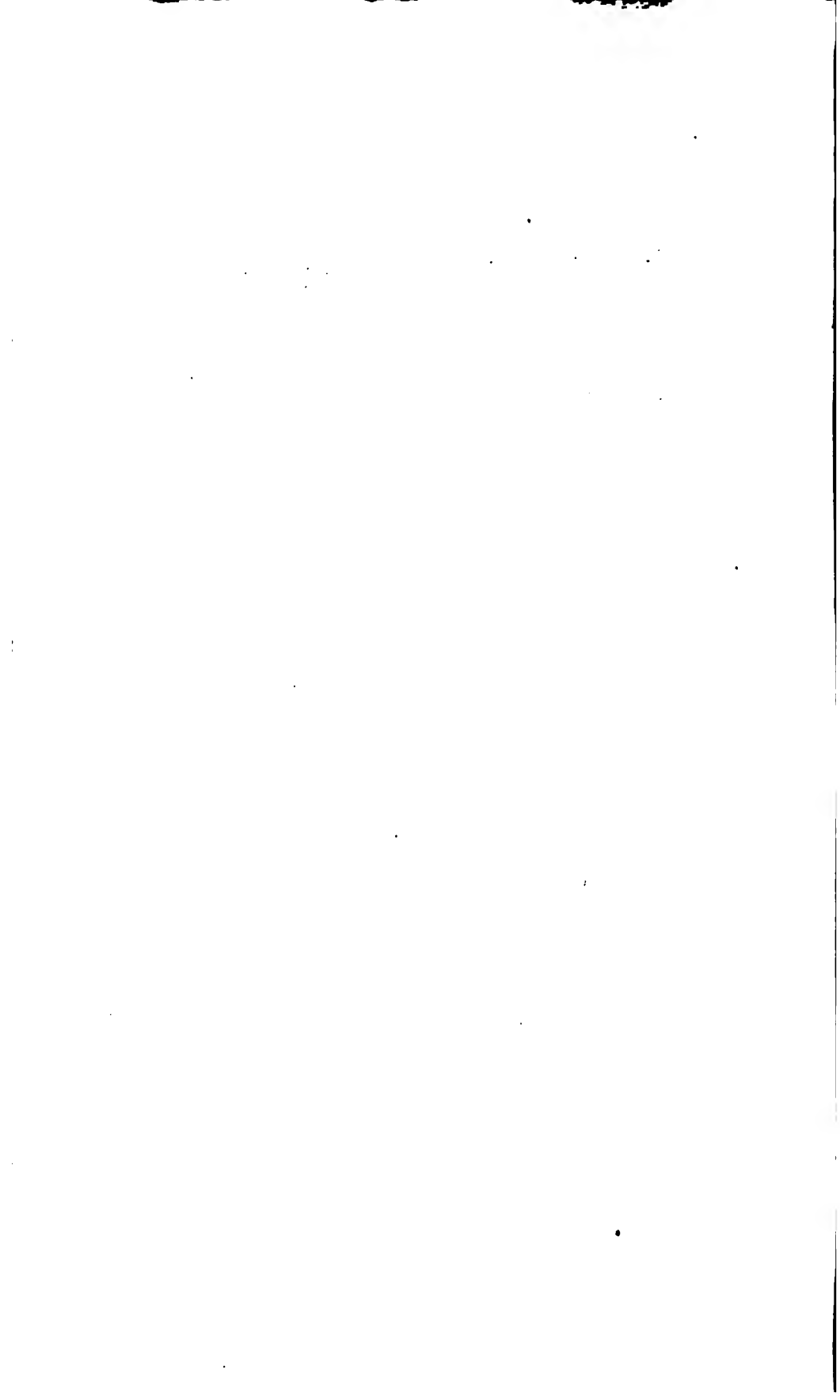
Concurred in by Justices *Catron*, *McKinley*, and *Grier*.

Ch. J. *Taney* dissented in an opinion of great length, and with him were Messrs. Justices *Daniels*, *Nelson*, and *Woodbury*, in favor of affirming the judgment of the court below. See also *Cunningham v. City of Boston*, 15 Gray, 468; *Cunningham v. Munroe*, id. 471.

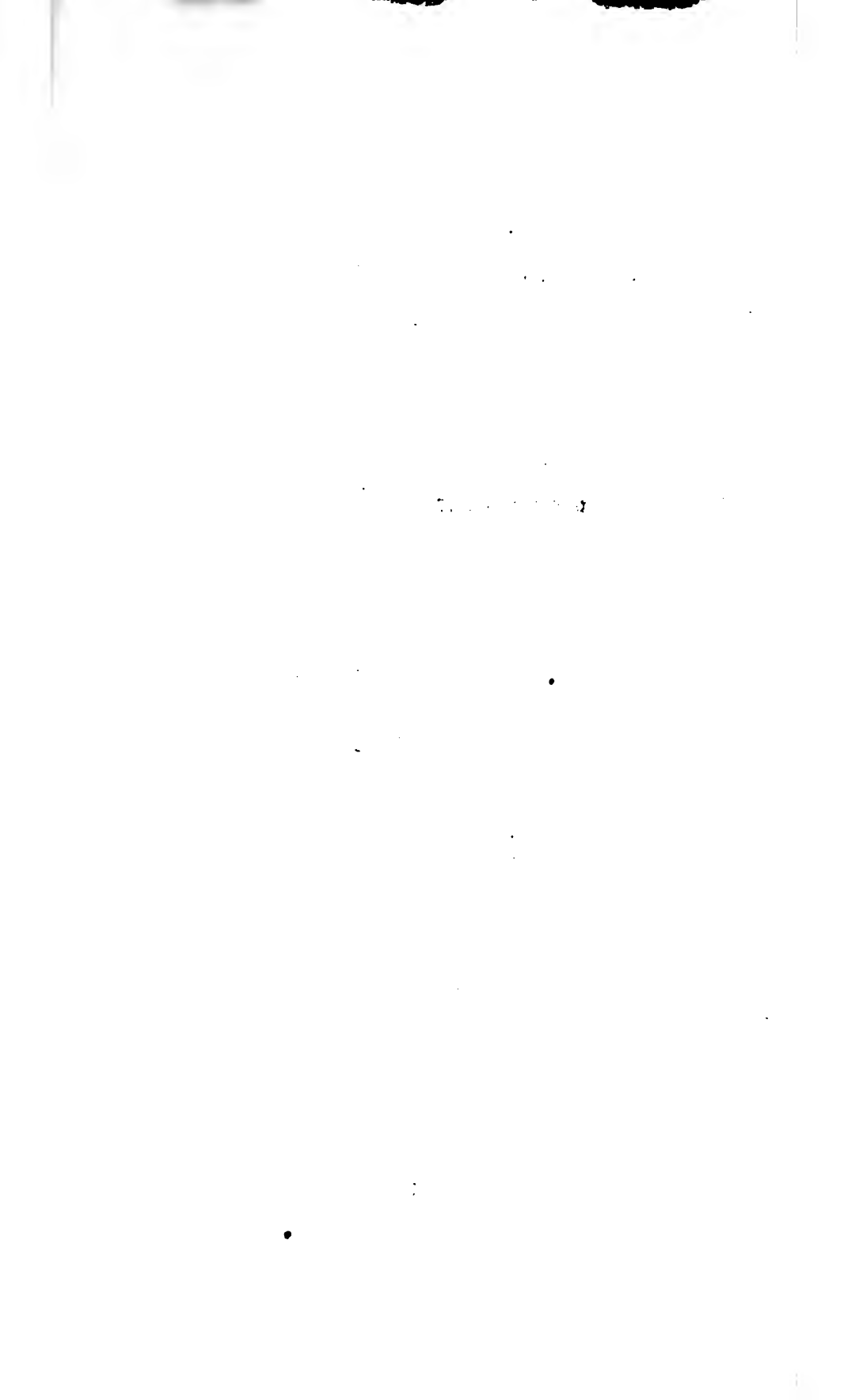




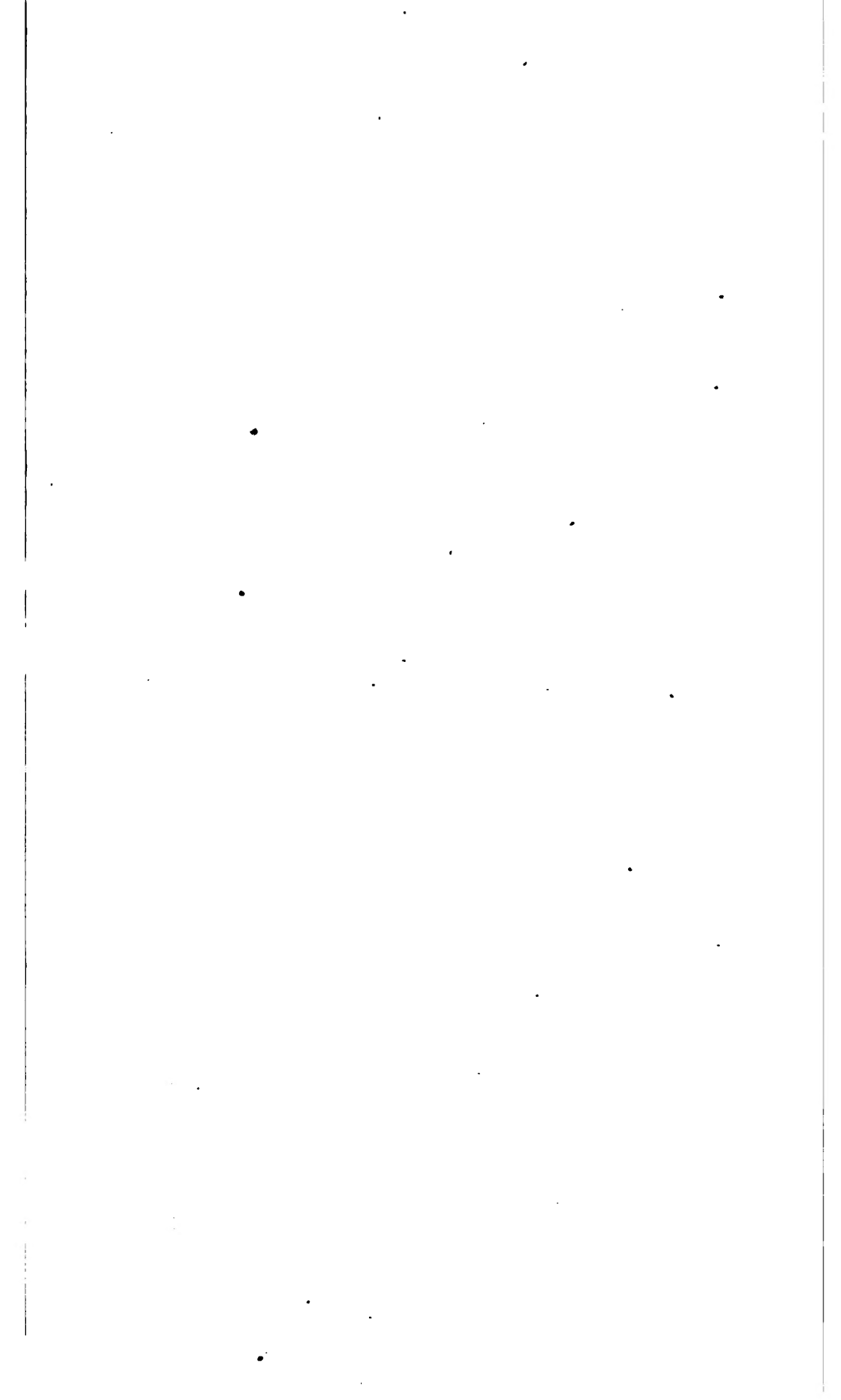












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